IN THE

SUPREME COURT OF THE UNITED STATES.

THE RELATIONS WHICH THE UNITED STATES SUSTAINS UNDER THE CONSTITUTION TO ACQUIRED TERRITORY.

ARGUMENT OF HON. JOHN W. GRIGGS,

Attorney-General of the United States,

ON BEHALF OF THE GOVERNMENT.

DECEMBER 18, 1900, AND JANUARY 10, 1901.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, December 18, 1900.

JOHN H. GOETZE, APPELLANT, V. THE UNITED STATES.

No. 340. On appeal, etc.

FOURTEEN DIAMOND RINGS, MANUEL PEPKE, CLAIMANT, PLAINTIFF IN ERROR, V. THE UNITED STATES.

No. 419. On writ of error.

ARGUMENT OF THE ATTORNEY-GENERAL.

If your Honors please: It may be that, while following the counsel in their pleasant wandering among the fields of general principles and plucking the flowers of eloquence, we have gotten away from the exact point where the cases lie, and therefore I shall explain very briefly the facts.

The Goetze case is one where the constituted authorities of the United States required an importer at the port of New York to pay the same duty on his goods brought from Porto Rico that they required other importers from other countries, which were admittedly foreign, to pay. There was no exercise of authority by the President or anybody else over the island of Porto Rico; and so in the case of the diamond rings, this worthy and gallant soldier, who had fought in a Dakota regiment, and, having also a tendency to thrift, had gathered up a rather unusually large collection of jewels, which he brought back into the country without entering them at the custom-house, as the Government claimed, with the intention of defrauding it out of the tariff duty; and therefore the Government proceeded under the revenue laws by means of an information to forfeit the rings in accordance with the law, and the only possible defense that the soldier could have would be that these were not dutiable.

It seems to have been supposed to be of some consequence that he had been born in the United States; that he enlisted in the United States service; that he had fought, and even been wounded, in the service of his country in Luzon. All of these are things to be proud of, but they have nothing to do with the case.

The contentions of the Government in these cases I have endeavored to state succinctly and together. They are these: The tariff act of 1897 declares that "there shall be levied, collected, and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duties which are by the schedules

and paragraphs respectively prescribed." That is the law in the Goetze Case. The law in the Pepke Case goes farther, and provides for condemnation by means of an "information," where goods are brought in without being invoiced and scheduled for duty. The Government contends, and the court below held, that this act applied to merchandise imported from Porto Rico and the Philippine Islands after their cession to the United States, exactly as it did before; that, within the meaning of the act, these countries are to be regarded as foreign, belonging to but not forming, in a domestic sense, a part of the United States; that it is within the constitutional province of the treaty-making power to accept the cession of foreign territory upon such terms, conditions, and limitations as to its internal status as may best subserve the interests of the United States; and it is not necessary to invest such territory with the full status of an integral part of the Union; that this is one of the ordinary and necessary sovereign powers of an independent nation, and nothing in the Federal Constitution or in the fundamental principles that underlie our Republic denies to the nation a right to the full exercise of this usual and common sovereign right; that the treaty-making power, the President and the Senate, as evidenced by the language of the treaty of Paris, did not intend to make Porto Rico and the Philippine Islands integral parts of the United States, but intended, in several particulars, to reserve their final status for adjustment by Congress, at the same time making peculiar and special differential provisions for variations and exceptions in customs and port regulations as to Spain and Spanish goods and subjects, which are inconsistent with the intention that the ceded countries became, upon the ratification of the treaty of peace, a part of the United States in all respects and in the fullest sense.

The Government contends that the term "foreign countries" in the act of 1897 is to be regarded as having been understood by Congress to be subject to the rule of interpretation of the phrase given by the Supreme Court in the case of *Fleming* v. *Page*, where it was held that under our revenue laws every port is regarded as a foreign one until expressly established as domestic under the authority and control of the statutes of the United States.

That is, the clause of the Constitution which declares that duties, imposts, and excises shall be uniform throughout the United States does not apply to nor govern these cases, because the term "United States," as there used, means only the territory comprised within the several States of the Union, and was intended only for their benefit and protection, and not for the benefit or protection of outside territory belonging to the nation; that in the latter sense duties on imports from these islands are uniform throughout the United States, because they are uniformly imposed at every port in the United States, so that there is no preference given to the ports of one State over those of another, nor is any inequality between the several States created.

That the right to bring merchandise into the United States is a right entirely within the regulation of Congress; such right in nowise differs as to either citizens or aliens. Citizenship carries with it no special or peculiar privileges at the custom-house. The American, the Spaniard, the Porto Rican, are treated alike. The basis of the customs laws is not ownership, but (1) the geographical origin of the shipment, and (2) the nature of the goods. The duty is imposed against merchandise, not upon the importer.

The Government contends, therefore, that in view of the fact that tariff laws are *in rem*, there is no principle of justice, much less of constitutional restriction, which forbids Congress from taxing in this way the merchandise of outlying possessions of the United States when brought into the ports of the Union. That the limitations of the Constitution as to customs, etc., were intended to secure equality between the States in the geographical sense, and not to forbid Congress from exercising the ordinary sovereign power of taxation as to the products of other sections of country not included within the geographical boundaries of the States; for which we rely upon the opinion of this court in *Knowlton* v. *Moore*, as decisive and conclusive.

Now, if the foregoing propositions are sound, then it is established (1) that the tariff act of 1897 was intended by Congress to classify as foreign all countries not a part of or belonging to the United States at the time of its passage, and the subsequent cession of the Spanish islands to the United States did not operate to admit imports from those islands free of duty under that law; (2) that the tariff act so construed and enforced violates no constitutional rule of uniformity.

And the case of the plaintiffs in error would seem on these grounds to have no legal foundation.

The Government might well be content to rest its argument upon these propositions. But counsel for the plaintiffs in error, in the court below as well as in this court, have gone far beyond these limits, and have challenged and denied the constitutionality of certain provisions of the treaty of Paris, contending that the cession of Porto Rico and the Philippine Archipelago effected a complete incorporation of those countries with the United States, so that they have become a part of the United States in the fullest and largest sense, not only internationally, but organically, so completely, indeed, that no difference or distinction can be made by law between imports from those countries and imports from one of the States of the Union.

They insist that there can be no limited or qualified acquisition of territory by this nation; that when Porto Rico was ceded to the United States it came at once under the obligations of the Constitution and became entitled to the privileges of the Constitution, its inhabitants citizens of the United States, and its territory a part of the United States. They argue, therefore, that the clause of the treaty which says that "the civil rights and political status of the inhabitants shall be determined by the Congress," in so far as it is intended to defer the full enjoyment of the rights and privileges of citizenship under the Constitution until Congress shall bestow them hereafter upon the inhabitants, is *ultra vires* and void, or at least superfluous and ineffective, because the Constitution *ex proprio vigore* extends at once, as an automatic operation, to all territory ceded to this Government, and no treaty or treaty-making power can hinder or even delay it.

Mr. Justice BREWER. Do you class Arizona and New Mexico in the same category?

The ATTORNEY-GENERAL. Do I now?

Mr. Justice BREWER. Yes.

The ATTORNEY-GENERAL. With respect to this tariff law? No, sir.

Mr. Justice BREWER. How with reference to the Constitution?

The ATTORNEY-GENERAL. That is a part of my argument, sir. Do you wish me to anticipate it? I will go into it now if your honors prefer.

Inasmuch as the right to bring goods into a port of the United States free of duty is not one pertaining to American citizens any more than to aliens, the discussion of the citizenship of the Porto Ricans and Filipinos would seem to be irrelevant; but the importance of the question and the attention given to it, as well as to the other cognate contentions on the part of the counsel of plaintiffs, seem to make it necessary to answer their arguments and demonstrate the entire constitutionality of the conduct and policy of the executive and legislative branches of the Government in dealing with these subjects of grave importance which have been so recently and multitudinously thrust upon them in the quick progress of events.

There is no doubt that it was the intention of the treaty of Paris not to make the ceded islands a part of the United States.

No doubt, also, it was intended by that instrument not to make the inhabitants citizens.

So that if the treaty is not to have effect as so intended it must be because it violates in some respect the Federal Constitution, and this court is called upon to declare the treaty void in the respects before referred to.

No particular provision of the Constitution is cited or relied on by counsel to justify such an unprecedented judgment, but a principle is sought to be deduced from the nature of our organization as a government which, they say, forbids this nation to hold sovereignty over subject territory which it does not make a part of itself under the Constitution. If this were true, it would be a limitation upon the usual and necessary powers of a sovereign independent nation of such tremendous importance as to justify us in inquiring why it was not clearly expressed in the fundamental law by the men who drafted our Constitution. They were learned in the law of nations, they knew the nature of colonies and provinces and how they were acquired by treaty and conquest and discovery, and how they were held and governed by other nations. They gave to the nation they founded the usual untrammeled powers of making war and treaties, the most frequent methods by which foreign territory is acquired by the nations of the earth. If they intended to restrict or limit their own government in these respects, would they not have done so in express terms? They did not do so by any language which can even be suggested as capable of such import, and it is therefore right—nay, necessary—to conclude that they did not intend to do so.

But I shall not rest on the mere negative inference. I shall show, by tracing the history of this country from the date of its foundation, that they did not intend so to limit or curtail the national power and sovereignty; that so far from their intending to organize a government which should be incapable of acquiring foreign territory except upon condition of making it an organic part of the United States, the early statesmen of the Republic were under the impression that no territory could be annexed to and become a part of the United States without actually amending the Constitution.

They were clear in their views—these early statesmen were—that we could acquire territory, but all doubted, and many denied positively, that it was within the constitutional power either of the President and Senate by treaty, or of the President and Congress by legislation, to add to the original limits of the United States. They had no doubts whatever as to the power of Congress to govern acquired

territory on the basis of a colony or province, or as territory outside the Union.

I shall show that the practical construction put upon the Constitution by the Executive and Congressional branches of the Government for a hundred years has, with one partial exception, been uniform in regarding acquired territory as neither bound nor privileged by that instrument until brought within its operation, either by express compact in the treaty or by act of Congress, and that acts of Congress do not apply to after-acquired territory until extended to it by subsequent legislative enactment.

Counsel have been at great pains to prove that the Government of the United States is one of delegated powers, and that its powers are not absolute and untrammeled, but subject to certain limits never and nowhere to be transcended; that the vague political entity known as "the People" stands behind the constituted agencies of Government, holding in reserve the sources of supreme power, capable and ready to alter or destroy at its pleasure. They call these doctrines truisms, and so they are. They do not help us in these cases.

The Government of the United States, under the Constitution, has been vested, not with all powers, but only with certain particular powers. These particular delegated powers are in some respects limited and confined in scope and operation, but in other respects they are entirely unlimited. So that the real and practical question is whether there is any limitation preventing the particular thing here complained of.

It is worth while, perhaps, in passing, to allude to the fact that "the people" referred to are not the people of the territories or the outlying possessions of the United States, but the people of the several States, who for themselves and their posterity ordained and established the Constitution of the United States, not for the benefit of the territory belonging to it, but in order to establish among themselves a more perfect union.

Counsel confuse ideas when they argue that the contention of the Government in these cases implies the possession by Congress of all unlimited and despotic powers in the government of territory.

We mean no more than this court meant when it said:

> "The power of Congress over the Territories is general and plenary.
>
> "Its sovereignty over them is complete.
>
> "It has full and complete legislative authority over the people of the Territories and all departments of the Territorial governments.
>
> "The people of the United States, as sovereign owners of the national Territories, have supreme power over them and their inhabitants.
>
> "In legislating for the Territories Congress would doubtless be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution than by any express and direct application of its provisions."

We do not pretend, no one pretends, that Congress, irrespective of any limitation of the Constitution, could properly make and enforce a

law to take without cause the property of one person and vest it in another; nor that it could by legislative act decree or enforce the death of a person where no offense had been proven or alleged; nor that it could properly constitute a person a judge in his own case; nor expel without cause a citizen from its territory. These are all instances of despotic power which no Congress would claim, much less attempt to exercise. And it is probably immaterial whether they are forbidden or not by any express terms of the Constitution; they would be held as a violation of those personal rights of the individual which underlie our Republic.

But there are vested in Congress by the people certain powers which, though subject to limitations in some respects, are absolute, unlimited, and unrestricted in other respects. For instance, the power to raise revenue by taxation in its various forms is, within the States, limited to the principle of geographical uniformity; but as to inherent uniformity, it has no restriction whatever. Nor is there any limit upon the power or discretion of Congress to fix the rates of taxation upon particular kinds of property, nor to select the particular object of taxation.

This court has declared that the power to tax is the power to destroy. Congress can tax property out of existence. It can practically prohibit importations by duties which are denominated protective.

Private property may not be taken for public use except upon just compensation, but there is no limit as to the quantity, location, or kinds of private property that may be absorbed in the public administration.

There is no definition or limitation of the causes for which war may be declared and carried on, and no restriction as to the terms upon which peace may be concluded.

Since the day of *McCulloch* v. *Maryland* this court has been engaged continuously in endeavoring to ascertain and fix the precise points at which the powers of Congress are limited by the Constitution, and the points where its powers are plenary and unrestricted. A doctrine as general as the statement of counsel for the claimants in these cases would have relieved this court of the larger part of its work for a century.

In ordaining the Constitution and fixing the powers of the various instrumentalities created thereby, the reliance of the people was not more on express prohibitions or restrictions than upon the sense of justice and the patriotic purpose of their own representatives, whose policies and action are open to popular review and correction at stated periods by means of Congressional elections.

There is no power of legislation that can not be exercised harshly and with essential injustice toward some persons, but the exercise of the power is not from that fact to be declared unconstitutional. Many laws which are wise and just and for the general welfare operate harshly on individual cases, but they are not for that reason to be denounced as despotic or tyrannical.

There is no similarity between what the Government is attempting to do in these cases, namely, impose a tariff upon goods brought from an outlying possession of the United States into a port of the Union, and what, in the contemplation of Chief Justice Taney, was proposed in the case of Dred Scott. To the eye of the court, in the latter case, the facts assumed a posture in which the private personal property of a citizen, property as strictly vested in him by the principles of the

Constitution as any ordinary chattel, was to be taken from him merely because he carried it from a State where it was lawful and constitutional property to a place where a law of Congress had declared that property in slaves should no longer exist. The proposition was, to declare that which in one place was property to be no longer property, but an emancipated person, free from restraint, control, or ownership.

There is no such claim in this case; there is no proposition here to confiscate or destroy the property of anyone, citizen, alien, amigo, or hostile. The proposition here is merely a demand of a right at the custom-house to tax a particular piece of property. That does not, when it is stated in that way, rouse the indignation of a liberty-loving citizen; that does not properly provoke any sense of outcry on behalf of any other citizen. The mere proposition that the United States shall levy a tax on a particular piece of property at its ordinary established place of taxing imports of goods is not an astonishing or a fearful proposition. It is a thing that is practiced every day upon all classes of people. No person in this land, born here, naturalized here, just arrived here, no matter what his rank or title, has any more privileges at the custom-house than any other, the lowliest, the most remote person. It is a mere question in this case of the right to tax; and let me call your attention, if your honors please, before I enter into a full discussion of the principles of the case, to this, that Goetze, the importer at New York, does not appear before this court either as a citizen of the United States or as an alien; and I say it does not make any difference, although counsel contend that citizenship makes a great difference. But further than that, it does not appear that the tobacco which he brought to the port of New York and claimed the right to enter without the payment of duty, was the product of the country from which he brought it. So far as the record in this case goes, Mr. Goetze may have brought that tobacco from Mexico, taken it into Porto Rico, and then have attempted to bring it up to New York and get it in free of duty. So far as appears in this case, Mr. Pepke may have got these diamond rings from some Chinaman who brought them from Hongkong or Tientsin, and carried them in his pocket into the Philippine Islands, and the attempt is now to bring them into the United States without the payment of any duty, merely because they are in this instance brought from one of these insular possessions. This illustrates one of the dangers that would arise under our system of Government if this court were to declare that the very instant a treaty of peace was ratified a ceded country became subject to the customs and the other laws of the United States. If that were so, this would be the position: We have a custom-house in this country, and anyone attempting to bring goods here would meet with the bar of the constituted authorities and officials. But we have no custom-houses, for instance, in Porto Rico; we have none in the numerous islands of the Philippine Archipelago, and there is no law which justifies the establishment of any there. I am assuming that the treaty is ratified and the law applies there. There is no revenue district, there is no revenue officer, there is no right of inspection, no duty of entry by invoice, there is no demand to pay duty there, there is nothing to prevent the goods of all the world being taken into those places, and then upon the mere proposition that they have come, not as a product, but as imports from these islands, entering the ports of the United States duty free. In these cases these

may be the very facts. It may be that neither this tobacco nor these diamond rings have ever contributed anything whatever to the revenues of the United States, and, it may be, for all we know, that they are products of other countries, not the Philippines or Porto Rico, or any country belonging to the United States. The proposition to tax at our own ports merchandise coming from another place is not, irrespective of the Constitution, startling, any more than taxation of the individual property within the United States would be.

Nobody's sense of justice is shocked, or would be shocked, by a law which taxed all the real estate of the United States for the benefit of the United States; nor is anybody's sense of justice outraged by taxing the imports, whether they be merchandise or whether they be clothing for private use, brought into our ports from foreign countries by our own people. There is no sense of outrage nor injustice in that. Nor is there anything strange or unusual in taxing at our home ports, at the home ports of the mother country, the imports from what we may call, for clearness of understanding, colonies. Our forefathers were perfectly familiar with this. Great Britain at her own custom-house levied a duty on imports from all the colonies that she owned, and you can not find in the Declaration of Independence, nor in any of the complaints made by the Revolutionary agitators, Samuel Adams, nor Otis, nor Patrick Henry, nor any of them, one word of complaint against the taxation of American products at the port of Liverpool, or Plymouth, or Southhampton, or London. What they complained of was that England attempted to raise revenue on the goods which they brought in themselves, their claim being that they exercised the right of self-government as English colonists, and not as conquered people, and had the right to impose the taxes themselves; that they ought to tax within the sphere of their geographical jurisdiction, and that England could tax within the sphere of her geographical jurisdiction; and you will find the English statutes very full of provisions as to what the commerce regulations should be in order to promote the interests, sometimes of Great Britain, and sometimes of the ministry of Great Britain, and sometimes of the colonies themselves.

In 1786 Thomas Jefferson was minister of the Confederation at Paris, and in a letter to a friend he wrote:

> "Our Confederacy must be viewed as the nest from which all America, North and South, is to be peopled. We should take care, too, not to think it for the interests of that great continent to press too soon on the Spaniards. These countries can not be in better hands. [For the present, he meant.] My fear is that they are too feeble to hold them till our population can be sufficiently advanced to gain it from them piece by piece."

Well, Spain did hold some of it on this continent until 1898, when the people in whose interest Jefferson was writing were strong enough to gain the last pieces from them.

"The navigation of the Mississippi [Jefferson says] we must have. This is all we are yet ready to receive."

Now, the thought that inspired that idea in Jefferson was not an altruistic one. It was a commercial and patriotically selfish one. He did not want the control of the Mississippi for the purpose of civilizing and educating the people who inhabited the region along its banks. He did not want New Orleans for the benefit of the exiles from Acadia,

or of the Creoles, or of the French population, or of the few Spaniards who had remained there; he wanted it for the commercial benefit—the selfish commercial benefit—of the United States. And it was for that reason, and upon that principle and theory, that the United States, the little narrow strip of Atlantic seaboard, which formed our Government more than a hundred years ago, has pressed across the Alleghenies, across the Mississippi, across the Missouri, across the Rocky Mountains, down to the Gulf, down to the Rio Grande, north to the Arctic Circle, and out into the Pacific seas.

The man who wrote this clause in the Constitution, "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," was Gouverneur Morris. He, also, had the commercial idea. In 1803, after we had acquired Louisiana by treaty, he wrote:

> "I always thought that when we should acquire Canada and Louisiana it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief that had it been more pointedly expressed a strong opposition would have been made."

Now, if your honors please, the point I desire to make here is, that at the bottom of all these acquisitions of territory, at the bottom of that clause of the Constitution which authorized the acquisition, authorized the Government of the acquisition, lay the material, the commercial, the expansive idea of the thrifty, progressive, active American, the pioneer spirit that, pressing onward from frontier to frontier, went out to reduce and conquer territory for their own use and benefit. I propose to argue that when our forefathers made the Constitution they made it as States, or as the people of the States. And when they put in restrictions and limitations, they were mutually giving and taking. The States were giving to the National Government, surrendering certain powers which theretofore they had possessed themselves, and were stripping themselves of such powers for the future. They were conferring them upon the National Government, and those powers of which they were stripping themselves were powers that they had had with respect to their own government theretofore—powers which they had exercised over their own domain as States; and in return they exacted of the National Government certain pledges by way of restriction and limitation as to what it could do to them and to their citizens concerning their affairs.

And so you go through the Constitution and you find that the limitations and the restrictions are on the Federal Government as it has to act upon the States in the exercise of powers which the States had given it—powers previously belonging to the States—and that the restrictions on the National Government are in matters as to which the States thought they would be injuriously affected if they did not guard themselves. Here is the whole Constitution, marvelously brief, but marvelously broad; but this whole Constitution is taken up with provisions for the organization of the Government, for the limitations of the powers of the Government in its action on the States and the people, and with limitations on the powers of the States in their action; but when they came to consider what they should do with that which

belonged to them, which was outside of the geographical limits of the States, they put it all into this one paragraph which Gouverneur Morris drew, and which was adopted *nem. con.*, without discussion.

Now why should they put any restrictions as to what the National Government should do with its territory? Why should they? That would have been merely putting restrictions on themselves as to their joint property. You see, the States preserved an autonomy within the autonomy of the nation—an independent autonomy to a certain extent, a sovereignty within a sovereignty—and they wanted to have the line of demarcation between the sovereignty they retained and the sovereignty they conferred on the Federal Government, clearly marked and defined. But there was no internal sovereignty existing in any Territory, or in the people or government of any Territory, which it was necessary to conserve by metes and bounds within the fundamental law. It was common property, and therefore it was proper that to the legislative body of all the States, to their Senators and their Representatives in Congress assembled, and to their President, should be committed the absolute, untrammeled power of dealing with that which they all owned jointly and in common.

I have divided my argument into several heads, more for the purpose, perhaps, of making a consistent and complete logical statement of the view of the Government than because I deem it necessary to enforce my argument by certain propositions which are not denied. For instance, I state as one point that:

THE UNITED STATES IS A SOVEREIGN NATION, POSSESSING THE SAME POWERS OF ACQUIRING TERRITORY POSSESSED BY OTHER NATIONS, AND THAT IT MAY CONSTITUTIONALLY ACQUIRE TERRITORY BY PURCHASE, BY CONQUEST, OR BY DISCOVERY.

But that power is a national power, and it is as unrestricted as the power of Germany, or Russia, or Great Britain. It was unrestricted from the day that the nation was born, because in the great Declaration it was asserted that as "*free and independent States they* (the United States of America) *have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.*"

From that day to this there has never been, and there does not exist now, a single limitation on the power of the National Government to levy war, to conclude peace, to make treaties, on the same terms and to the same extent that other nations of the earth may.

And then I consider next what the power of the nation is as to governing acquired territory, and I place it, if your honors please, under that clause which Gouverneur Morris drew and which he said was intended for that purpose. I do not think this court at this day will resort to the suggestion of the Chief Justice in the Dred Scott case, that the only power to acquire territory is under that clause of the Constitution which allowed Congress to admit additional States. There have been too many decisions placing that power under the clause regulating the disposition and government of the property of the United States; there have been too few references to the ground on which the Chief Justice in the Dred Scott case placed it, to make it necessary to argue at this day that the power of the Government to govern territory does flow from the Territorial clause of the Constitution. Even in the Canter case, the Chief Justice referred to that clause as being sufficient for the exercise of governmental control by

Congress over acquired territory. And in the Mormon Church case Mr. Justice Bradley clearly placed the right of Congress to govern territory upon that clause. The court will pardon me if once more I read that opinion—at least a portion of it. It has the clearness of view and expression that characterizes that great judge.

> "The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, *became the absolute property and domain of the United States, subject to such conditions as the Government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting these territories.* Having rightfully acquired said territories, the United States Government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident."

Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights, not in favor of State rights, if your honors please, not in favor of limitations upon the geographical portions of the United States, but in favor of *personal rights* which are formulated in the Constitution, which exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct applications of its provisions. In other words, it is not the words of the Constitution that restrains Congress in its action upon Territories and the inhabitants of Territories. It is not the words of the Constitution, for, according to Mr. Justice Bradley, there are no words there that restrain them. The power is plenary and complete, but there is restraint arising out of those limitations in favor of personal rights which exist, not in the letter, but in the spirit of the Constitution.

And so in this case, if your honors please, in order to justify the clamor of these plaintiffs, you have got to find an infraction of a fundamental personal right.

Mr. Justice HARLAN. Do you think Mr. Justice Bradley meant to restrict it to personal right?

The ATTORNEY-GENERAL. I think he did; yes, sir.

Mr. Justice HARLAN. Do you admit that Congress could establish titles of nobility in the territories of the outlying possessions?

The ATTORNEY-GENERAL. I do not know whether he did or not. He may not have had that in his mind. He was referring to the rights of persons.

Mr. Justice HARLAN. That is why I suppose he used the term "personal rights."

The ATTORNEY-GENERAL. We are not dealing with titles of nobility, nor any such rights, nor considering whether Congress can create lords; nor are we dealing with any personal rights.

But when it comes to personal rights, which is what we are dealing with in this case, we need not consider whether Justice Bradley thought Congress could set up an establishment of religion or confer titles. He was speaking of personal rights, and that is what we are dealing with in this case. He held that there were not any under territorial government except such as arose out of the fundamental principles that underlie and are not expressed within the Constitution.

International law declares that the new sovereign may deal with the inhabitants of conquered or ceded territory, and give them such law as he sees fit. They receive political privileges and benefits at the will of the new Government, and not by virtue of the automatical operation of the laws of the new sovereign.

In the great case of Campbell against Hall, which was four times argued before it was decided by Lord Mansfield, the distinction was made between countries which are colonized by the citizens or inhabitants of the parent country and those which are obtained by conquest or cession from a foreign country; and the doctrine which I have read, namely, that the laws of the home or parent country do not extend to the acquired territory, was declared by him to be the doctrine and law of England. But when colonists from England established under the patent of the Crown, or by right of discovery, a colony or offshoot of the home Government, they took with them the laws of their own country, and these became, so far as they were suitable to the place, the laws for the guidance of the colonists.

In the case of *Johnson* v. *McIntosh*, it was said:

> "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.
>
> "When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, *or safely governed as a distinct people*, public opinion, which not even the conqueror can

disregard, imposes these restraints upon him; and he can not neglect them without injury to his fame and hazard to his power." *Johnson* v. *McIntosh*, 8 Wheat., 543, 589.)

Other expressions in opinions of this court relative to the power and control of Congress over acquired territory includes the following:

Clinton v. *Englebrecht* (13 Wall., 434), where Chief Justice Chase said:

"The theory upon which the various governments for portions of the territory of the United States have been organized has been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority and with certain fundamental principles established by Congress (p. 441)."

Observe he didn't say anything about the fundamental principles of the Constitution!

And thereupon court adjourned until the next day, December 19, 1900.

May it please the court: I had reached page 20 of my brief, when the court rose last evening, and was quoting the decision of this court in the case of *Clinton* v. *Englebrecht*. The court further said in that case:

"There is no Supreme Court of the United States, nor is there any district court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the General Government. The courts are the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States."

And in the case of *National Bank* v. *County of Yankton* (101 U. S., 129) the court said:

"It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded. The act to adapt the ordinance to provide for government of the territory northwest of the river Ohio to the requirements of the Constitution (1 Stat., 50) is chapter 8 of the first session of the First Congress, and the ordinance itself was in force under the Confederation when the Constitution went into effect. All territory within the jurisdiction of the United States"—

Observe the court does not say "forming a part of the United States," but says "within the jurisdiction of the United States."

—"not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress

may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities, but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

"In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the Territorial legislature, nor was it necessary. Such a power is an incident of sovereignty and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid and a valid one void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."

And in the case of *McAllister* v. *The United States* (141 U. S., 174), which related to the power of Congress or the President to terminate the term of office of a Territorial judge in Alaska, Mr. Justice Harlan, of the present bench, expressing the opinion of the court, said:

"An elaborate argument, displaying much thought and extended research upon the part of counsel, has been made in support of the proposition that, upon general principles, lying at the foundation of our institutions, the judicial power in the Territories, exercised as it must be for the protection of life, liberty, and property, ought to have the guaranties that are provided elsewhere within the political jurisdiction of the nation for the independence and security of judicial tribunals created by Congress under the third article of the Constitution. We have no occasion to controvert the soundness of this view, so far as it rests on grounds of public policy. But we can not ignore the fact that while the Constitution has, in respect to judges of courts in which may be vested the judicial power of the United States, secured their independence by an express provision, that they may hold their offices during good behavior and receive at stated times a compensation for their services that can not be diminished during their continuance in office, no such guaranties are provided by that instrument in respect to judges of courts created by or under the authority of Congress for a Territory of the United States. The absence from the Constitution of such guaranties for Territorial judges was no doubt due to the fact that the organization of governments for the Territories was but temporary, and would be superseded when the Territories became States of the Union. The whole subject of the organization of Territorial courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive, and the manner in which they may be removed or suspended from office, was left by the Constitution with Congress under its plenary power over the Territories of the United States. How far the exercise of that power is

restrained by the essential principles upon which our system of government rests, and which are embodied in the Constitution, we need not stop to inquire, though we may repeat what was said in *Mormon Church* v. *United States* (136 U. S., 1, 44), referring to the expression of Mr. Justice Bradley in that case."

Now, allow me right here, if your honors please, to call attention to the fact that if the Constitution was framed for the Territories, and for the government of the Territories; if the jurisdiction of Congress over the Federal judiciary was restrained only as to the States, then we have here a very important and a very controlling decision. Certainly when the Constitution defines the jurisdiction of the courts of the United States, and puts safeguards about the judiciary to preserve its independence from executive and legislative interference, it is doing a thing which is of great importance to the States; and admittedly it has done that for the States. The phrase it uses is "the judicial power of the United States." But this court holds that that does not extend to the Territories; that the judicial power of the Territories is derived entirely from Congress under its power to legislate for territory, and is not derived from that other provision of the Constitution.

Now it is quite important, I suppose, that the independence of the judiciary should be preserved. That is a subject that our forefathers complained about. In the catalogue of royal grievances contained in the Declaration of Independence is one charging that the King had interfered with the administration of justice by making the tenure of office of the judges depend upon the royal will and the payment of their salaries upon the royal pleasure. Therefore, assuming that when they formed a constitution they intended to protect themselves in the new government against the direct objects of their complaints, they made provision for the independence of their judiciary. But the provision was limited to the States. They did not protect the Territories. According to the decision of this court in the Canter case and the McAllister case, the term "United States" in the judiciary clause of the Constitution means nothing more than the States united. But a very strong argument might be made, as was made in the McAllister case, to the effect that the very principles of our Government, the history of our independence, of our protests to the King, all went to prove that the independence of the judiciary was one of the objects for which the Constitution was formed; and that if the people of the Territories were under the Constitution, they were entitled to this guarantee. The court said the distinction was made because the Territories were not governed under the judiciary clause of the Constitution, but under the special clause which gave Congress power to make all rules and regulations respecting the territory belonging to the United States.

I cite, further, as to the power of Congress to govern Territories, the case of *Benner* v. *Porter*, and the case of the *United States* v. *Kagama*, where Mr. Justice Miller, delivering the opinion of the court, said, referring to a tribe of Indians:

"But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, coun-

ties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The Territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize Territorial governments and make laws for their inhabitants arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States as from the ownership of the country in which the Territories are and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else."

Then I refer to the opinion of the circuit court in the case of *Endleman* v. *United States* (86 Fed. Rep., 457); and, as having appropriateness to some phases of this question that either now or in the near future will be presented, to the case of *New Orleans* v. *Steamship Company* (20 Wall., 373), where the following statement of the broad and untrammeled power of the conqueror of territory was made:

"Although the city of New Orleans was conquered and taken possession of in civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that Government had the same power and rights in the territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the preexisting authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. *There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war.* These principles have the sanction of all publicists who have considered the subject."

And Story, writing in 1833, and following closely the language of Chief Justice Marshall in *Insurance Company* v. *Canter*, thus expresses the power of the National Government with reference to ceded territory:

"As the General Government possesses the right to acquire territory, either by conquest or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern what it has so acquired. The territory does not, when so acquired, become entitled to self-government, and it is not subject to the jurisdiction of any State."

I need not pause to emphasize that expression, that country ceded by one to another, ceded to the United States, does not become entitled

to self-government. That proposition is conceded by the counsel on the other side, but it seems to be one of the strange popular misapprehensions to suppose that the right of self-government is a judicial right in a territory; that it can be enforced by some kind of a decree of the court, when nothing is clearer from all the expressions of this and all the other courts of the Union on the subject, from practice and experience, both of the past and present day, that under our Constitution the right of self-government does not exist in the people of the Territories or outlying possessions of the United States; does not exist in the people of the District of Columbia; does not exist in the people of Alaska; does not exist in the people of Indian Territory; does not exist in any Territory. It is a mere matter of political discretion, of public policy, to be determined by Congress, as to whether any self-government, and if so, how much, shall be conferred upon any Territory of the United States.

Story continues:

> "It must, consequently, be under the dominion and jurisdiction of the Union, or it would be without any government at all. In cases of conquest the usage of the world is, if a nation is not wholly subdued, to consider the conquered territory as merely held by military occupation until its fate shall be determined by a treaty of peace. But during this intermediate period it is exclusively subject to the government of the conqueror. In cases of confirmation or cession by treaty, the acquisition becomes firm and stable, and the ceded territory becomes a part of the nation to which it is annexed"—

Now note this: "either on terms stipulated in the treaty or on such as its new master shall impose"—recognizing what I shall later contend for in this case, that the Government which has the power to obtain foreign territory by treaty has the right to stipulate in the treaty the terms upon which it will accept and hold the ceded territory.

> "The relations of the inhabitants with each other do not change; but their relations with their former sovereign are dissolved and new relations are created between them and their new sovereign. The act transferring the country transfers the allegiance of its inhabitants. But the general laws, not strictly political, remain as they were until altered by the new sovereign. If the treaty stipulates that they shall enjoy the privileges, rights, and immunities of citizens of the United States, the treaty, as a part of the law of the land, becomes obligatory in these respects."

Judge Story puts the privilege of citizenship upon the stipulations of the treaty, and makes a stipulation in the treaty necessary to create the rights, immunities, and privileges of citizens of the United States for the inhabitants.

> "Whether the same effects would result from the mere fact of their becoming inhabitants and citizens by cession, without any express stipulation, may deserve inquiry if the question should ever occur [quoting exactly the language of Mr. Chief Justice Marshall]. But they do not participate in political power; nor can they share in the powers of the General Government until they become a State and are admitted into the Union as such.

Until that period the territory remains subject to be governed in such manner as Congress shall direct, under the clause of the Constitution now under consideration." (2 Story on the Constitution.)

Again he says, in paragraph 1328:

"The power of Congress over the public territory is clearly exclusive and universal; and their legislation is subject to no control, *but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787*, under which any part of it has been settled."

It has frequently been asserted, and we have long been taught, that President Jefferson, in acquiring the cession of the Louisiana territory, violated the Constitution, or, at least, supposed he had violated it. I think it will be found on an examination of this question that the common opinion on this subject is an error. I think it will appear that Mr. Jefferson and his Cabinet, and all the public men of his day, were without any doubt whatever that the United States, under the Constitution as it then existed, had absolute power to acquire foreign territory; and Mr. Jefferson had no doubt on that subject. What he and some others did doubt was whether the treaty could by stipulation incorporate the ceded territory so as to make it properly a part of the United States. We are met now with the contention that neither Congress nor the treaty-making power can acquire territory, *unless by that very act it becomes a part of the United States;* that, if they should stipulate in the treaty that it was not to become a part of the United States, nevertheless the supreme effect of the Constitution would be to make it such in spite of the treaty-making power. *In other words, that this nation can not own territory unless it is an integral part of the United States in the fullest and most absolute sense.*

I shall show, if your honors please, that the statesmen of 1803, comprising many members of the Constitutional Convention, men of the most distinguished learning in law, in statesmanship, in government, in history, familiar with the spirit that evolved our Constitution and formed our Government, that these men all believed we had the right to acquire territory and to govern it as a colony or a province, and that it was not necessary to make it a part of the United States. And the only point of difference between the Federalists, who at that time were few in number, and the supporters of the Jeffersonian administration was on this point: Whether it was possible, by express stipulation in the treaty, or by act of Congress, to make ceded territory a part of the United States. The Federalists, led by Timothy Pickering, of Massachusetts, contended that we could not do it, that Congress could not do it, that the President and Senate could not do it, that the President and House and Senate could not do it, that it was not possible to do it as to territory outside of the Northwest Territory without amending the Constitution. They held that we could not even admit a new State outside of that territory because it would require the consent of all the States.

That which is commonly cited in support of the erroneous view attributed to Mr. Jefferson, is his letter to Senator Breckenridge, of Kentucky, August 12, 1803, some months after the treaty with France had been signed. The treaty was signed in April, 1803. The language there used is as follows:

"This treaty must, of course, be laid before both Houses, because both have important functions to exercise respecting it.

> They, I presume, will see their duty to their country in ratifying and paying for it, so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to the nation for an additional article to the Constitution approving and confirming an act which the nation had not previously authorized. The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The Executive, in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution."

If this language stood by itself and were the only utterance of Jefferson on the subject, it would justify that belief as to his opinion on the constitutional question which has been commonly attributed to him. An examination, however, of his writings and of his whole course of action with reference to the Louisiana purchase, especially with reference to the constitutional question, shows conclusively that Mr. Jefferson's doubt was not with reference to the power of the United States *to acquire foreign territory*, but rather as to the right *to annex it to and make it a part of the United States.*

It was in January, 1803, that Mr. Jefferson, who, ever since 1786, as I have shown, had been casting a properly covetous eye toward the commercial advantages of the Mississippi River, the key of which was in the possession of New Orleans, dispatched James Monroe to France with $2,000,000 to buy—not the province of Louisiana, but to buy New Orleans; and the question arose then as to the form in which the purchase could constitutionally be made.

The Attorney-General, Levi Lincoln, suggested that the treaty should be so framed as to make it appear that the United States was not acquiring territory, but as extending already existing territory by an alteration of its boundary.

This letter of the Attorney-General was sent by the President to Gallatin. Counsel seemed to think yesterday that I had given Mr. Gallatin undue credit in saying that he was really the constitutional lawyer of Jefferson's administration. I say so, because I think the answer of Mr. Gallatin to the President's letter, transmitting the opinion of the Attorney-General, evinces the clearest and most remarkable comprehension of the Constitution on this subject that had ever been uttered up to that time.

This is what Mr. Gallatin replied: he exposed first the impracticability and fallacy of the Attorney-General's scheme, and suggested the view that finally prevailed with Jefferson, and has been maintained and sanctioned by the Executive and Judicial Departments of the Government to the present time. I am quoting exactly his words as he wrote them: "To me it would appear"—notice the lawyer-like, logical arrangement of this—"(1) that the United States as a nation has an inherent right to acquire territory." That sounds like a phrase out of Mr. Justice Bradley's opinion. "(2) That whenever that acquisition is by treaty, the same constituted authorities in which the treaty-making power is vested have a constitutional right to sanction the acquisition; (3) that whenever the territory has been acquired Congress has the power either of admitting it into the Union as a new State, or of annexing to a State, with the consent of that State, or of making regulations for the government of such territory." That was Mr. Gallatin's opinion.

To this Mr. Jefferson replied, in the month of January, 1803, very promptly, and said: "You are right, in my opinion, as to Mr. L.'s proposition." And then he continues:

> "*There is no constitutional difficulty as to the acquisition of territory, and whether when acquired it may be taken into the Union by the Constitution as it now stands* will become a question of expediency. I think it will be safer not to permit *the enlargement of the Union* but by amendment of the Constitution." (Gallatin's writings, vol. 1, p. 115.)

distinguishing most clearly between the acquisition of territory which was not to become a part of the United States and the admission of acquired territory, when acquired, into the Union.

Now, your honors, will remember that when Monroe arrived in Paris, Mr. Livingston had received a new and startling proposition from the First Consul to cede, not New Orleans, but the whole vast extent of the Louisiana Province, and they proceeded with their negotiations and drew up the treaty in the form in which it stands at the present day. By the third section of that treaty they provided that the inhabitants of the ceded territory shall be incorporated into the Union of the United States. Jefferson's language is "and whether when acquired it may be taken into the Union." The language of the treaty is "incorporated into the Union." "The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

It might be interesting to investigate the authorship of that section or paragraph. It was contained in the *projêt* of the treaty which was proposed by the First Consul to our commissioners, and inasmuch as these negotiations were conducted without the assistance of Talleyrand, the first minister, it is pretty fair to presume that that language was drafted either by the First Consul himself or by his confidential friend in the negotiation, Barbé Marbois, who was acquainted with the principles of the Constitution of the United States, because he had lived here and had married an American wife.

Now, it is reasonable to suppose that whatever constitutional defects Mr. Jefferson believed to exist, he would have attempted to cure by any amendment which he might have drawn or proposed on this subject. He did prepare two different drafts as amendments to the Constitution to cure what he thought was the defect. The first draft was probably sent to Mr. Gallatin in July, 1803, for in a letter on July 9 of that year Mr. Gallatin says: "The amendment to the Constitution is intended, I presume, for deliberation and reflection, but not for immediate decision." Now, this draft made by Mr. Jefferson declares "*the province of Louisiana is incorporated with the United States and made a part thereof.*"

In other words, Mr. Jefferson, not doubting our right to acquire the territory, but desiring to carry into effect the stipulation of the third paragraph of the treaty, drew up an amendment to the Constitution which did not say that the acquisition by the treaty of Louisiana was

ratified, but did say that Louisiana is incorporated in the United States and made a part thereof. That is what he thought a constitutional amendment was necessary for; and at the end of that amendment he used this clause: "Vesting the inhabitants thereof with all rights possessed by other Territorial citizens of the United States;" "Territorial citizens," thus making them a class by themselves. This was only a product, tentative product, of Mr. Jefferson's mind and brain, and he withdrew it and prepared a much shorter one, which on the 23d of August, he sent to Gallatin, and which he thought was better than the previous one.

That began: "*Louisiana as ceded by France to the United States is made a part of the United States.*" He accepts the cession as a complete, effective, constitutional act, but to make it a part of the United States he prepares this amendment, in order to keep faith, to enable him to keep faith, with the stipulation that he had made with France as to the admission of the inhabitants of this territory into the Union. He further continues:

> "Its *white inhabitants* shall be *citizens*, and stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations. Save only that, as to the portion thereof . . north of the latitude of the mouth of the Arcansa River, no new . . te shall be established nor any grants of land made therein other than to Indians in exchange for equivalent portions of lands occupied by them until an amendment of the Constitution shall be made for these purposes.
>
> "Florida also, whensoever it may be rightfully obtained, shall become a part of the United States. Its white inhabitants shall thereupon be citizens, and shall stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations."

Under date of July 7, 1803, Jefferson wrote to William Dunbar:

> "Before you receive this you will have heard through the channel of the public papers of the cession of Louisiana by France to the United States. The terms as stated in the National Intelligencer are accurate. That the treaty may be ratified in time, I have found it necessary to convene Congress on the 17th of October, and it is very important for the happiness of the country that they should possess all information which can be obtained respecting it, that they may make the best arrangements practicable for its good government. It is most necessary, because they will be obliged to ask from the people *an amendment of the Constitution authorizing their receiving the province into the Union* and providing for its government, and limitations of power which shall be given by that amendment will be unalterable but by the same authority." (Jefferson's Writings, vol. 8, p. 254.)

Wilson Cary Nicholas, a warm personal and political friend of Jefferson, conferred with him upon the constitutional question, and early in September wrote Jefferson a letter in which he declared that upon an examination of the Constitution he found the power as broad as it could well be made, except that new States can not be formed out of the old ones without the consent of the State to be dismembered. (Adams's History of the United States, vol. 2, p. 87.)

In reply to him, Jefferson wrote on September 7, 1803:

> "I am aware of the force of the observations you make on the power given by the Constitution to Congress *to admit new States into the Union without restraining the subject to the territory then constituting the United States.* But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I can not help believing that *the intention was to permit Congress to admit into the Union new States which should be formed out of the territory for which and under whose authority alone they were then acting.* I do not believe it was meant that they might receive England, Ireland, Holland, etc., into it, which would be the case under your construction. When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation where it is found necessary than to assume it by a construction which would make our powers boundless." (Writings of Jefferson, vol. 8, p. 247.)

He had some doubt at that time whether it would not be better to go on with his constitutional amendment, but he got over that. On August 18 we find he wrote to Breckenridge again, and said:

> "I wrote you on the 12th instant on the subject of Louisiana and the constitutional provision which *might be* necessary for it. A letter received yesterday shows that nothing must be said on that subject which may give a pretext for retraction, but that we should do *sub silentio* what shall be found necessary."

Writing to James Madison on the same date, he said:

> "I infer that the least we say about constitutional difficulties respecting Louisiana the better, and that what is necessary for surmounting them must be done *sub silentio.*" (Writings of Jefferson, vol. 8, p. 245.)

By the time Congress had assembled, on October 17, Mr. Jefferson's doubt as to the constitutional power of admitting the new territory into the Union seems to have entirely vanished. He does not seem to have supposed, however, that the territory had become incorporated into the Union or would become so incorporated by virtue of the mere treaty of cession. In his message to Congress, transmitted on October 17, he referred to that body the subject of government of the territory, as well as its incorporation into the Union, saying:

> "With the wisdom of Congress it will rest to take those ulterior measures which may be necessary for immediate occupation and temporary government of the country; *for its incorporation into the Union.*" (Jefferson's Writings, vol. 8, p. 269.)

And a year later, 1804, writing to the Secretary of State, Mr. Madison, and referring to this clause of the treaty by which we had stipulated to admit the inhabitants into the Union, he said:

> "The article has been worded with remarkable caution on the part of our negociators. It is that the inhabitants shall be admitted as soon as possible, according to the principles of our Constitu-,

to the enjoyment of all the rights of citizens, and, *in the mean time, en* attendant, be maintained in their liberty, property & religion. That is, that they shall continue under the protection of the treaty *until the principles of our Constitution can be extended to them.*"

That is the first expression, I think, you will find mentioning the extension by direct act through Congress of the principles of the Constitution to Territories or the inhabitants of territory. This letter was written in July, 1804, and prior to that time Congress had passed a law for the government of Louisiana, intrusting the government almost absolutely to the President, and had extended several laws, especially the revenue laws, to Louisiana, or at least to New Orleans. But Mr. Jefferson thought that the principles of our Constitution were not yet extended to them, for he says:

> "*Until the principles of our Constitution can be extended to them*, when the protection of the treaty is to cease, and that of our own principles to take its place. But as this could not be done at once, it has been provided to be as soon as our rules will admit. *Accordingly Congress has begun by extending about 20 particular laws by their titles to Louisiana.* Among these is the act concerning intercourse with the Indians, which establishes a system of commerce with them admitting no monopoly. That class of rights therefore are now taken from under the treaty and placed under the principles of our laws. I imagine it will be necessary to express an opinion to Gov. Claiborne on this subject, after you shall have made up one." (Writings of Thomas Jefferson (Ford), Vol. VIII, p. 313.)

In another letter to Madison, under date of August 15, 1804, Jefferson says:

> "I am so much impressed with the expediency of putting a termination to the right of France to patronize the rights of Louisiana, which will cease with their complete adoption as citizens of the United States, that I hope to see that take place on the meeting of Congress." (Idem, p. 315.)

Mr. Jefferson's view was that the stipulation in the treaty that the inhabitants should be protected in their liberty, their property, and their religion, that they should be admitted as soon as possible into the Union, was a stipulation which France in the forum of national law could insist upon and enforce; that it was a stipulation made by her in behalf of her former subjects, and that the obligation of it was a sacred treaty obligation, which, whether Congress repealed it or not, could be enforced by arms, if necessary, at the demand of the nation that formed the other party to the treaty.

Now, Mr. Madison, who was something of a constitutional lawyer, if Mr. Gallatin was not, had the same opinion that Jefferson held, that we could certainly acquire, but could not incorporate or confer citizenship by means of treaty.

Article III of the Louisiana treaty violated the instructions which Madison had given to the commissioners, Livingston and Monroe. In his letter to them of March 2, 1803, he had told them: "To incorpoporate the inhabitants of the hereby ceded territory with the citizens of the United States being a provision which can not now be made, it

is to be expected from the character and policy of the United States that such incorporation will take place without unnecessary delay" (State Papers, 2, 540), holding out to them a means or excuse for promising to the First Consul that, while we had not the power now to take them into the Union, to make them a part of the United States, to make the inhabitants citizens, yet that our policy was such, and that we would do it just as soon as we could.

These being the views of the Executive Department in the first instance of the acquisition of foreign territory after the formation of the Constitution, I desire next to call your attention to the views of the other branches of the Government, the Senate and the House—the legislative branches.

A debate arose in October, 1803, within two or three days after the ratification of the treaty, upon a bill authorizing the creation of a stock to pay the purchase money for Louisiana, and the bill to provide a temporary government for it. And these debates are conclusive that whatever doubt existed among public men at that time as to constitutional authority, related not at all to the power to acquire territory, but to the right of either the treaty-making power or of Congress to attach it to and make it a part of the United States. On this point both Federalists and Republicans agreed.

In the Senate, Timothy Pickering, voicing the views of the Federalists, said:

> "It is declared in the third article that the inhabitants of the ceded territory shall be incorporated in the Union of the United States. *But neither the President and Senate nor the President and Congress are competent to such an act of incorporation.*"

And yet the doctrine of our friends on the other side is that neither the President and Senate nor the President and Congress can acquire a foot of land *unless they incorporate it into the United States.* Mr. Pickering believed that "our administration admitted that this incorporation could not be effected without an amendment to the Constitution." There is the cotemporary statement of what the view of a prominent Senator was as to the opinion of the President. It was that the incorporation could not be effected without an amendment.

Mr. Pickering believed the action of each individual State to be necessary for the admission of a foreign country as an associate in the Union. He "had never doubted," he said, "the right of the United States to acquire new territory, either by purchase or by conquest, and to govern the territory so acquired as *a dependent province;* and in this way might Louisiana have become a Territory of the United States, and have received a form of government infinitely preferable to that to which its inhabitants are now subject."

John Taylor, of Virginia, voicing without doubt the views of the President and following the line of reasoning pursued by Gallatin in his letter to Jefferson, thus expressed his view of the power of the United States to acquired territory:

> "Before a confederation, each State in the Union possessed a right, as attached to sovereignty, of acquiring territory by war, purchase, or treaty. This right must be either still possessed or forbidden both to each State and to the General Government, or transferred to the General Government. It is not possessed by the States separately, because war and compacts with foreign powers

and with each other are prohibited to a separate State; and no other means of acquiring territory exist. By depriving every State of the means of exercising the right of acquiring territory, the Constitution has deprived each separate State of the right itself. Neither the means nor the right of acquiring territory are forbidden to the United States; on the contrary, in the fourth article of the Constitution, Congress is empowered "to dispose of and regulate the territory belonging to the United States." This recognizes the right of the United States to hold territory. The means of acquiring territory consist of war and compact; both are expressly surrendered to Congress and forbidden to the several States; and no right in a separate State to hold territory without its limits is recognized by the Constitution, nor any mode of effecting it possible, consistent with it. The means of acquiring and the right of holding territory, being both given to the United States, and prohibited to each State, it follows that these attributes of sovereignty once held by each State are thus transferred to the United States; and that, if the means of acquiring and the right of holding are equivalent to the right of acquiring territory, then this right merged from the separate States to the United States, as indispensably annexed to the treaty-making power, and the power of making war; or, indeed, is literally given to the General Government by the Constitution."

In the course of his speech he further said:

"Being incorporated in the Union as a Territory and not as a State, a stipulation for citizenship became necessary, whereas it would have been unnecessary had the inhabitants been incorporated as a State and not as a Territory. And as they were not to be invested with citizenship by becoming a State, the delay which would occur between the incorporation of the Territory into the Union and the arrival of the inhabitants to citizenship according to the principles of the Constitution, *under some uniform rule of naturalization*, exhibited an interim which demanded the concluding stipulation for 'protection in the meantime for liberty, property, and religion.' As a State of the Union, they would not have needed a stipulation for the safety of their 'liberty, property, and religion;' *as a Territory, this stipulation would govern and restrain the undefined powers of Congress to make 'rules and regulations for Territories.'*"

Uriah Tracy, of Connecticut, argued that the third article of the treaty, in undertaking to incorporate the inhabitants into the Union, was an unconstitutional compact. He declared, however:

"I have no doubt but we can obtain territory either by conquest or compact, and hold it, even all Louisiana, and a thousand times more, if you please, without violating the Constitution. We can hold territory; but *to admit the inhabitants into the Union, to make citizens of them, and States, by treaty, we can not constitutionally do;* and no subsequent act of legislation, or even ordinary amendment to our Constitution, can legalize such measures. If done at all, they must be done by universal consent of all the States or partners to our political association. And this universal consent I am positive can never be obtained to such a pernicious measure as the admission of Louisiana—of a world, and such a world—into our Union."

John Quincy Adams, the colleague of Timothy Pickering, declared that for his part he was free to confess that the third article, and more especially the seventh article, which allowed special preferences to the vessels of France and Spain when laden with the produce or manufactures of those countries, in coming to the ports of Louisiana, contain engagements placing us in a dilemma from which he saw no possible mode of extricating ourselves but by an amendment, or, rather, an addition to the Constitution. Mr. Adams, however, voted against his party and with the supporters of Jefferson in favor of the passage of the bill. So much for the Senate.

On October 25, 1803, the House of Representatives, in Committee of the Whole, proceeded to discuss the Louisiana treaty. The opposition of the Federalists here, as in the Senate, was based upon the alleged unconstitutionality of the third and seventh articles.

Gaylord Griswold, of New York, declared the third article to be a compact beween the French Government and that of the United States to admit to citizenship persons out of the jurisdiction of the United States as it now is and to admit territory out of the United States to be incorporated into the Union. He did not find in the Constitution such a power vested in the President and Senate. He thought it was not consistent with the spirit of the Constitution that territory other than that attached to the United States at the time of the adoption of the Constitution should be admitted.

But if he were wrong in this contention and the right of extending the limits of the United States be given by the Constitution, its exercise is vested in the legislative branches of the Government and not in the President and Senate, because the Constitution declares that new States may be admitted by Congress into this Union. (Annals of Congress, vol. 13, p. 431, etc.)

Mr. Griswold further argued that article 7 of the treaty was unconstitutional, because, if the new ceded territory, with the inhabitants, should become incorporated with the United States there would be ports of entry into the United States into which French and Spanish vessels may enter on terms different from those on which they may enter other ports of the United States, thereby violating the mandate of the Constitution which declares that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. (Idem, 434.)

James Elliott, of Vermont, in replying to the objections urged against article 7, declared:

> "The States as such were equal and intended to preserve that equality; and the provision of the Constitution alluded to was calculated to prevent Congress from making any odious discriminations or distinctions between particular States."

"It was not contemplated," says Mr. Elliott, who was a most able lawyer, "that this provision would have application to colonial or territorial acquisitions." (Idem, p. 450.)

There is a statement made in Congress, in 1803, by an eminent statesman and lawyer, construing this clause. It was made in the hearing and within the reading of numerous members of the Constitutional Convention. It was made by a supporter of the Jeffersonian administration, and the doctrine there enunciated was adopted and acted upon practically by Mr. Jefferson in dealing with this question with reference to the ports of New Orleans.

Mr. Thatcher declared:

> "The Confederation under which we now live is a partnership of States, and it is not competent to admit a new partner but with the consent of all the partners. If such power exist it does not reside in the President and Senate. The Constitution says new States may be admitted by Congress. If this article of the Constitution authorizes the exercise of power under the treaty, it must reside with the legislature and not with the President and Senate."

Mr. Smilie, of Pennsylvania, speaking for the Administration and answering the objectors, declared "another constitutional difficulty had been started, from the alleged obligation of the United States to incorporate this territory in the Union." He quoted the third article of the treaty, and declared that if the prevailing opinion should be that the inhabitants of the ceded territory can not be admitted under the Constitution as it now stands, the people of the United States can, if they see fit, apply a remedy by amending the Constitution so as to authorize their admittance. *And if they do not choose to do this, the inhabitants may remain in a colonial state*—clearly expressing the opinion that they did not become incorporated in the Union merely by the act of cession regardless of any stipulations in the treaty.

Roger Griswold, of Connecticut, a Federalist, for the opposition, declared it scarcely possible for any gentleman to advance an opinion that the President and Senate may add to the members of the Union by treaty whenever they please; or, in the words of this treaty, may incorporate in the Union of the United States a foreign nation, who, from interest or ambition, may wish to become a member of our Government. Such a power would be directly repugnant to the original compact between the States and a violation of the principles on which that compact was founded.

"I have been persuaded," said he, "that the framers of the Constitution never intended that a power should reside in the President and Senate to form a treaty by which a foreign nation and people shall be incorporated into the Union, and that this treaty, so far as it stipulates for such an incorporation, is void." (Idem, p. 462.)

Answering Mr. Smilie, he further remarked:

> "A gentleman from Pennsylvania, however (Mr. Smilie), has said that it is competent for this Government to obtain a new territory by conquest, and if a new territory can be obtained by conquest, he infers that it can be procured in the manner provided for by the treaty. While I admit the premises of the gentleman from Pennsylvania, I deny his conclusion. *A new territory and new subjects may undoubtedly be obtained by conquest and by purchase, but neither the conquest nor the purchase can incorporate them into the Union. They must remain in the condition of colonies, and be governed accordingly.* The objection to the third article is not that the province of Louisiana could not have been purchased, but that neither this nor any other foreign nation can be incorporated into the Union by treaty or by a law; and as this country has been ceded to the United States only under the condition of an incorporation, it results that, if the condition is unconstitutional or impossible, the cession itself falls to the ground."

Nicholson, of Maryland, a confidential friend of the President, and doubtless speaking for him, defended the constitutionality of the

treaty. Referring to the objections urged against the third article, he used this language:

> "It can not be contended that the territory is *ipso facto* admitted, but the objection is, that the President and the Senate have no right to pledge the Government for anything not immediately within their own powers." (Idem, p. 469.)

This objection, he contended, was not solid. Every day's practice proves that it is without any force whatever, because almost all treaties contain stipulations which must be performed by the Houses of Congress if they are ever performed at all.

He further used this significant language:

> "Whatever may be the future destiny of Louisiana, it is certain that it is now a State. It is a territory purchased by the United States, in their confederate capacity, and may be disposed of by them at pleasure. *It is in the nature of a colony whose commerce may be regulated without any reference to the Constitution.* Had it been the island of Cuba which was ceded to us, under a similar condition of admitting French and Spanish vessels for a limited time into Habana, could it possibly have been contended that this would be giving a preference to the ports of one State over those of another, or that the uniformity of duties, imposts, and excises throughout the United States would have been destroyed? And because Louisiana lies adjacent to our own territory, is it to be viewed in a different light? Or can the circumstance of its being separated by a river only, instead of the sea, constitute any real difference in regard to the commercial regulations which we may think proper to establish? The restrictions in the Constitution are to be strictly construed; and I doubt whether, under a strict construction, the very same indulgence might not be granted to the port of Natchez, which does not lie within any State, but in the territory of the United States. It has never been deemed expedient to do so, and in all probability never will. Nor is it presumable that this regulation in relation to New Orleans would have been made but for the importance of the great objects with which it was connected."

Cæsar A. Rodney, member from Delaware, afterwards Attorney-General, supported the constitutionality of the treaty. Among other things, he said:

> "The Constitution adverts to States themselves, and the distinction between States and Territories is bottomed upon reason. Whence the necessity of the distinction? When Territories grow into States and become represented in the public councils, a majority of them may league together and carry into effect regulations prejudicial to other States. Hence the Constitution provides that in all commercial regulations all the States shall be equally affected. But such a league can not be effected by Territories, which have no Senators in the other branch, and in this only the voice, without the vote, of a single Delegate. Independent of this consideration is this: If by any particular territorial regulation the territory of the United States is benefited, that territory being the common property of the United States, a public stock in which they all share, every State in the Union reaps alike the benefit."

Dr. Samuel Mitchill (afterwards a Senator), of New York, also defended the treaty in a notable speech, from which the following is extracted:

> "In the case of Louisiana no injury is done either to the nation or to any State belonging to that great body politic. There was nothing compulsory upon the inhabitants of Louisiana to make them stay and submit to our Government; but if they chose to remain it had been most kindly and wisely provided that, until they should be admitted to the rights, advantages, and immunities of citizens of the United States, they shall be maintained and protected in the enjoyment of their liberty, property, and the religion which they profess. What would the gentleman propose that we shall do with them? Send them away to the Spanish provinces, or turn them loose in the wilderness? No, sir; it is our purpose to pursue a much more dignified system of measures."

Then follows the first complete expression of the subsequent policy of the United States with reference to the territory that it has acquired.

> "It is intended, first, to extend to this newly acquired people the blessings of law and social order; to protect them from rapacity, violence, and anarchy; to make them secure in their lives, limbs, and property, reputation, and civil privileges; to make them safe in the rights of conscience. In this way they are to be trained up in a knowledge of our own laws and institutions. They are thus to serve an apprenticeship to liberty; they are to be taught the lessons of freedom, and by degrees they are to be raised to the enjoyment and practice of independence"—

not to be turned loose at once, ill-fitted, uneducated, incompetent to perform the high and important functions of citizenship, but to be educated up gradually to the high standard of the duty and privileges of an American citizen. "All this to be done as soon as possible"—

> "that is, as soon as the nature of the case will permit, and according to the principles of the Federal Constitution. Strange that proceedings declared on the face of them to be constitutional should be inveighed against as violations of the Constitution! Secondly, after they shall have been a sufficient length of time in this probationary condition, they shall, as soon as the principles of the Constitution permit, and conformably thereto, be declared citizens of the United States. *Congress will judge of the time, manner, and expediency of this. The act that we are now about to perform will not confer on them this elevated character.* They will thereby gain no admission into this House, nor into the other House of Congress. There will be no alien influence thereby introduced into our councils. By degrees, however, they will pass on from the childhood of republicanism, through the improving period of youth, and arrive at the mature experience of manhood. And then they may be admitted to the full privileges which their merit and station will entitle them to. At that time a general law of naturalization may be passed. *For I do not venture to affirm that, by the mere act of cession, the inhabitants of a ceded country become, of course, citizens of the country to which they are annexed. It seems not to be the case, unless specially provided for.* By the third article it is stipulated that the inhabitants

of Louisiana shall hereafter be made citizens; *ergo* they are not made citizens of the United States by mere operation of treaty."

Mr. Justice PECKHAM. From whose speech do you quote?

The ATTORNEY-GENERAL. I am quoting from the speech of Samuel Mitchill, of New York. He refers to the treaty of 1794, made with Great Britain, as settling the question that without an act of Congress aliens can be converted into citizens by the provisions of a treaty duly ratified by the President and the Senate. "This power of making citizens," he says, "has not been exercised by the President and Senate, but at a future day may be used by Congress."

Referring to the objections urged against article 7, he declared:

> "The preference forbidden by the Constitution applies to States in the Union and equal members thereof. The domain we are about to acquire is not a State; for that is a sovereign and independent republic. Nor is it a province; this being an inhabited country, subdued by force of arms. Nor is it a colony; which is a sprout or scion, as it were, of the parent trunk. In its relation to us, it is a territory; a word signifying a peculiar and mingled idea of a country and inhabitants in the inchoate or initial condition of a republic."

The resolution declaring that provision ought to be made for carrying into effect the treaty, etc., was adopted by a vote of 90 yeas to 25 nays.

On October 27 a further discussion arose in the House of Representatives upon consideration of the bill to enable the President of the United States to take possession of the territories ceded by France to the United States.

Mr. Smilie, speaking for the Administration party, declared that the Constitution of the United States did not extend to this territory any further than they were bound by the compact between the ceding power and the people.

The opinion these gentlemen held was that this compact in the treaty, when constitutionally ratified, became an inviolable compact, protected—they do not say, but possibly they thought—by the high obligation of international duty, and protected possibly by that principle which would prevent a nation from violating a compact like this, which could not be disregarded without national dishonor. Whether they thought that ordinary provision which prevents a private person from violating his own contract applied by any analogy to this, I do not know. Their idea was that this contract was a fundamental one, and possibly they had in mind what was ruled in the case of Hall *vs.* Campbell, by Lord Mansfield, the case I referred to yesterday, which related to a ceded island. After its cession the King, without Parliament, had under British law the right to govern it. Nevertheless he made an order or decree with reference to customs and revenues in the island, and it was held by Lord Mansfield that this was an irrevocable exercise of a power by the King, and that the King himself could never undo or repudiate it, and the King's officers could not; that nothing but the supreme power of Parliament could overthrow an act of that kind when once done by the King. I am unable to tell whether some such view as that was in the minds of these distinguished and able gentlemen (for I say, your honors, that you can not read in any of the subsequent

annals of Congress, I care not when, nor who were members of that body, a debate that reflects more credit upon the discretion, learning, and intelligence of the Members and Senators, than this debate from which I have just been reading). It seems to have been their idea that this compact in the treaty was something fundamental and inviolable.

Mr. Griswold, a Federalist, having been referred to by M. Rodney in the debate, rose to an explanation. He wished, he said, once for all to state what he had stated on a previous occasion, and what he had stated that day. *He did admit that the United States might acquire territory by war or purchase, and he had always admitted this. But he had said that they could not by treaty admit a foreign country and incorporate it into the Union.*

This may be taken as a correct expression of the only difference that existed between the Federalists and the Administration party so far as the constitutionality of the Louisiana treaty was concerned.

This and the provision with reference to preference to the ports of Louisiana for Spanish and French ships.

Mr. Justice WHITE. I see from your argument very clearly that your argument goes upon the ground, as you say, that the provisions of the treaty do not incorporate them properly into the United States. I don't quite see, as you were reading the debate, the ground upon which the Republicans, the Jeffersonian party, maintained that the treaty should be ratified. I can't quite see the thing as you read it in the debate.

The ATTORNEY-GENERAL. If your honors please, this is not a debate on the ratification of the treaty. The debate on the ratification of the treaty has never been preserved.

Mr. Justice WHITE. In that debate, what was the distinct ground taken by the Republicans, the Jeffersonians, on which they claimed that that treaty, containing a provision that the territory should be incorporated into the United States, should be ratified?

The ATTORNEY-GENERAL. The distinct ground was this, that that provision did not of itself incorporate them or make them citizens, but that it pledged the Government, through Congress, to do it. And as was said by one the speakers, that was a common thing in treaties. Many stipulations were entered into by one power with another, which could not be enforced except by the subsequent action of Congress. That is the ground on which they put it. They said they had the right to stipulate this, and Congress could ratify it, and Congress would ratify it in due time. As Mr. Mitchill said, after these people have gone through their infancy and youth, and have reached their maturity, they will be made citizens, and admitted into the Union.

Dr. Eustis, of Massachusetts, when the debate in February, 1804, upon the bill erecting Louisiana into two territories, and providing for the temporary government thereof, was under discussion, made a notable speech. He said:

> "The people, in my opinion, are at present unprepared for and undesirous of exercising the elective franchise. The first object of the Government is to hold the country. How? By protecting the people in all their rights, and by administering the government in such a manner as to prevent any disagreement among them—to use no other term. Suppose the people called upon to

choose those who are to make laws for them, does the information we possess justify the belief that this privilege would be so exercised as to conduce to the peace, happiness, and tranquillity of the country? I apprehend not. On the sentiments of the House on this point the decision of this motion must turn.

"According to this bill, the governor and the council are to make the laws. Suppose the council is in session and the governor possesses no power to prorogue them. Suppose they should engage in acts subversive of their relation to the United States. Would not this power be of essential utility? It appears to me indispensably necessary that a vein of authority should ascend to the Government of the United States until the people of the territory are admitted to the full enjoyment of State rights. From that knowledge of this people which I have been able to acquire, I have formed an opinion that authority should be constantly exercised over them, without severity, but in such a manner as to secure the rights of the United States and the peace of the country.

"The government laid down in this bill is certainly a new thing in the United States; but the people of this country differ materially from the citizens of the United States. I speak of the character of the people at the present time. When they shall be better acquainted with the principles of our Government, and shall have become desirous of participating in our privileges, it will be full time to extend to them the elective franchise. Have not the House been informed from an authentic source, since the cession, that the provisions of our institutions are inapplicable to them? If so, why attempt, in pursuit of a vain theory, to extend political institutions to them for which they are not prepared?"

Dr. Eustis seemed to have been impressed with the same purpose as Mr. Burke, who said he would prefer to have the people happy citizens rather than subtle disputants. He wanted to secure their material welfare.

"I am one of those who believe that the principles of civil liberty can not suddenly be engrafted on a people accustomed to a regimen of a directly opposite hue. The approach of such a people to liberty must be gradual. I believe them at present totally unqualified to exercise it. If this opinion be erroneous, then the principles of the bill are unfounded."

His metaphors were a little mixed, but his ideas very clear.

Now, this doubt held by Mr. Jefferson as to the power to annex territory by treaty to the United States, making it not a part of the Union, but bringing it within the United States in a particular way, and in accordance with the treaty stipulations, as was done by this treaty, has since been dispelled; the validity of the exercise of this kind of a power by treaty has been affirmed and may now be regarded as settled by judicial decision. In the oft-referred-to case of *American Insurance Company* v. *Canter*, the Chief Justice, referring to the sixth article of the treaty by which Florida was ceded to the United States, which article provides that the inhabitants shall be admitted to the enjoyment of the privileges, rights, and immunities of citizens of the United States, declared: "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of citizens of the United States."

In *Cross* v. *Harrison*, Mr. Justice Wayne seemed to admit by implication that it was competent for the treaty to make special regulations with respect to commerce, for he says:

> "By the ratifications of the treaty California became a part of the United States. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage" (16 How., 197)—

implying that the treaty-making power had the right to make stipulations on that subject.

In *Fleming* v. *Page* Chief Justice Taney said:

> "The United States may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace in order to indemnify its citizens for the injuries they have suffered or to reimburse the Government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority." (9 How., 614.)

In the Mormon Church case Mr. Justice Bradley said:

> "The Territory of Louisiana when acquired from France, and the Territories west of the Rocky Mountains when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the Government in its diplomatic negotiations had seen fit to accept relating to the rights of the people then inhabiting those Territories." (136 U. S., 42.)

In the case of *Geofroy* v. *Riggs* (133 U. S., 266) Mr. Justice Field declared:

> "The treaty power of the United States extends to all proper subjects of negotiation between our Government and the Governments of other nations."

THE CONCEDED POWER TO ACQUIRE TERRITORY BY TREATY OR BY CONQUEST INCLUDES THE RIGHT TO PRESCRIBE WHAT TERMS THE UNITED STATES WILL AGREE TO IN FIXING THE FUTURE STATUS OF ITS INHABITANTS.

The United States may stipulate that all subjects of the ceding or conquered government shall be removed; or that certain classes of them shall remove; or that a time may be given within which those desiring to retain their former citizenship or allegiance may declare their option to do so.

By what principle does the mere presence of a subject of the former sovereign in the ceded district entitle him to be considered a citizen of the United States? Can he be made such by operation of law against his will? Can he be made such by operation of the Constitution in spite of the treaty? If the treaty may suspend the operation of the Constitution in its own vigor long enough to permit the inhabitants to consider and decide whether they will become citizens or not, why can not it suspend citizenship forever? If one year can be properly stipulated, why not ten years, or twenty, or fifty?

The acquiring nation does not need to accept the population as its own people. If it takes the cession reserving the right to fix the status of the inhabitants of Territories, is that more against established doctrine than to insist that they shall not be taken at all?

Suppose a cession of a small island with a half dozen inhabitants is desired as a fort, or a military reservation, or a coaling station, or a place to land a cable, must the United States agree to permit those inhabitants to remain and accept them as citizens? Why should this Government be considered to have less power in this respect than other nations? What clause of the Constitution so compels? It has the absolute, untrammeled power of making war; it has the absolute, untrammeled power of making peace. So have other nations. Why should this nation be restrained by its own Constitution so that it can not make an advantageous bargain for itself whenever it compels a peace, or when it is compelled, if it ever should be, to make a peace? And if this restriction preventing us from treating the inhabitants of ceded territory as anything but citizens exists, how does it resist the right of the uncivilized tribes in Alaska and in the Mississippi and New Mexican regions to be counted as citizens? If there is an inherent principle in the Constitution which makes all citizens who are inhabitants, how is it that the 1,335 "free people of color" in New Orleans in 1803 did not then or subsequently become citizens?

The argument of Chief Justice Taney in *Scott* v. *Sandford* is that the term "people" in the Declaration of Independence and in the Federal Constitution was synonymous with citizens, and meant the same thing, and did not include the Indians nor the class of persons who had been imported as slaves, nor their descendants, *whether they had become free or not.* (19 How., 404 et seq.) And, not being citizens, they can claim none of the rights and privileges which that instrument provides for and secures to the citizens of the United States (p. 404), and had no rights or privileges but such as those who held the power and the Government might choose to grant them (p. 405), and might justly and lawfully be reduced to slavery for the benefit of the white race.

They were not embraced in the term "free inhabitants" in the Articles of Confederation, and could not be naturalized under the Federal powers of naturalization (p. 420).

That was what Chief Justice Taney said, limiting thereby the terms "inhabitants" and "citizens" to the white inhabitants of the United States. And he derived that from a consideration of what was meant by "the people of the United States." It was to protect a citizen of a State and of the United States in taking his property, to wit, Dred Scott, into a place where Congress had said slavery should not exist: it was to protect a citizen, a white citizen, in the ownership of a black man that he laid down this definition of what constituted the people of the United States.

The political status of native Indian tribes within territory acquired by the United States by treaty has been uniformly regarded as unaffected by the cession. A long line of special treaties with such tribes, and numerous acts of legislation by Congress on the subject of Indians and Indian rights, show that these people have always been regarded as quasi foreign.

And the decisions of this court are to the same effect.

Cherokee Nation v. *Georgia*, 5 Peters, 17.
United States v. *Rogers*, 4 Howard, 572.
Johnson v. *McIntosh*, 8 Wheat., 574.
The Cherokee Tobacco, 11 Wall., 616.

In the case of *Elk* v. *Wilkins* (112 U. S., 101), this court declared:

> "The main object of the opening sentence of the fourteenth amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes (*Scott* v. *Sandford*, 19 How., 393); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside.
>
> "This section contemplates two sources of citizenship, and two sources only—birth and naturalization—and the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth can not become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired."

I refer further, but will not take time to read, to the language of Judge Deady in the case of the *United States* v. *Osborne* (6 Sawyer, 406, 409), which is quoted in *Elk* v. *Wilkins* in this court with approval.

If, therefore, it be asserted that the "inhabitants" of territory ceded by treaty become *ipso facto*, and without reference to the stipulations of the compact, citizens of the United States, by what principle were "free persons of color" in Louisiana and Florida considered as without the class of citizens? They were not excepted by the treaty; nevertheless they were not regarded as entitled to the political privileges guaranteed by that instrument. Mr. Jefferson himself seems to have considered the "white" inhabitants alone entitled to be made citizens, as is evident from his draft of a proposed amendment to the Constitution.

Now the force of all this is that the terms "people of the United States" and "citizens of the United States" originally referred to the people of these States, and to such as Congress should, by naturalization or by treaty stipulation, make citizens, and nothing since, except the fourteenth amendment, has enlarged the class of people who may become citizens. That made the free negro a citizen, but it did not make those citizens who belonged to other races in other climes in the distant islands of the sea, uncivilized tribes in Sulu or Panay, uncivilized tribes in Tutuila, or uncivilized tribes in Alaska. It did not refer to them.

But the doctrine maintained here against the Government is not only that such persons may properly be made citizens and become a part of that potentiality known as the people of the United States, but that there is no power on earth, neither in the President and Senate, nor in the Congress, nor in the courts, nor anywhere else, that will enable the United States to secure the title to a foot of land anywhere, unless it makes the inhabitants, whether they be cannibals, or whether they be wild savages, no matter how unfit they may be to exercise the duties of citizens—unless it makes them citizens. Discretion all gone, power of discrimination all gone! Our forefathers who believed in Anglo-Saxon liberty as enforced and illustrated by

the Anglo-Saxon race, who believed in the common law as derived from the parent country and administered by colonists from parent countries, in providing the powers of the government they were forming, were so shortsighted, so unwise, that they made a constitution by which they could not for any purposes which the ages might disclose as useful or beneficial, acquire title to any foreign territory, unless with it they brought the inhabitants, no matter how incongruous, into the fold of "the people of the United States," subjecting them to the rules and principles of the common law and laying upon them the obligation and the duty of understanding the privileges and the conduct that should distinguish an American citizen.

Did our forefathers hamper us like that? If so, this Government was as misshapened as Richard the Hunchback:

> Deformed, unfinished, sent before its time
> Into this breathing world, scarce half made up,
> And that so lamely and unfashionable,
> The nations laugh at us as we halt by them.

Nothing can be clearer than that the universally accepted view in the time of Jefferson was, and always has been, that only they are citizens who are made such by the voluntary action of the United States, expressed either in the treaty of annexation, by act of Congress, or by process of naturalization.

This Government can not have citizens thrust upon it against its will. Experience and decision go to prove that the mere acquisition of territory does not confer political rights upon the inhabitants; that the Government can not be made to receive people as citizens except by its consent and cooperation, while it may acquire territory, and, therefore, sovereignty over the inhabitants without admitting them to the status of citizens of the United States.

The privileges of citizenship under our Constitution do not arise out of our ownership of the lands, nor out of the fact of national sovereignty over the inhabitants, notwithstanding they owe allegiance to the Government. Citizenship arises only from birth within the United States, or from naturalization; the former being a condition allowed by the Constitution, and the latter one permitted or denied at the will of Congress or the treaty-making power. I regard the admission of citizens by stipulation in a treaty as only a form of general naturalization.

The rule of international law applicable to the inhabitants of territory transferred from one sovereignty to another is stated by Halleck:

> "The transfer of territory establishes its inhabitants in such a position toward the new sovereignty that they may elect to become or not to become its subjects. Their obligations to the former government are canceled, and they may or may not become the subjects of the new government, according to their own choice. If they remain in the territory after this transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of the conquered and transferred territory is thus determined by their own acts. This rule is the most just, reasonable, and convenient which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his subjects

and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new state, and is not unjust toward those who determine not to become its subjects. According to this rule, *domicile*, as understood and defined by public law, determines the question of transfer of allegiance, or, rather, is the rule of evidence by which that question is to be decided." (Halleck's International Law, vol. 2, sec. 7, p. 475, 3d ed.)

It is at the option of the inhabitants whether or not they will become subjects of the new sovereign (assuming that no expatriation is demanded), but it is at the option of the sovereign whether they shall become citizens or not.

In *United States* v. *De Repentigny* (5 Wall., 260), it was expressly laid down as a rule of public law that the conqueror, who shall obtain permanent possession of the enemy's country, has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them.

Hall, in his Treatise on International Law (4th ed., 1895, p. 593), declares one of the effects of a conquest to be "to invest the conquering State with sovereignty over all subjects of a wholly conquered State and over such subjects of a partially conquered State as are identified with the conquered territory at the time when the conquest is definitively effected, so that they become subjects of the State and are naturalized *for external purposes, without necessarily acquiring the full status of subjects or citizens for internal purposes.*"

Now that is the position of the Government in this case, that when the United States acquire territory with inhabitants, unless the treaty fixes their status, they become for external purposes, in our relations with foreign countries, the subjects of the United States, entitled to its full protection, but they do not become citizens of the United States. They do not acquire the status of citizens of the United States within the constitutional meaning of that word.

The effects of a cession by a treaty concluded on the basis of *uti possidetis*, and of conquest, upon the inhabitants of territory which changes hands at the conclusion of a war, are identical. (Idem, p. 593, par. 206.)

It has been usual in treaties to insert provisions regarding the future political status of the inhabitants, and securing to them their property rights, and in some instances certain immunities and privileges. A common provision of this kind is one securing liberty to the inhabitants of the ceded territory to retain their nationality of origin.

The appropriateness of thus regulating by treaty the rights and status of the inhabitants may be said to be now universally recognized and followed by all civilized powers.

The power of the United States to make by treaty the stipulations upon this subject common to other nations is one flowing out of its national sovereignty, and is not restrained by any express language of the Constitution or by any implication from any provision contained in that instrument.

Hence, we find in every treaty by which the United States has acquired territory the rights and status of the inhabitants have been, to some extent, regulated and provided for, but not by a uniform method, but with extreme variance, indicating that the Presidents and Senates were acting in the belief that this Government possessed in this respect all the powers of any other nation.

"*Louisiana.*—The inhabitants to be incorporated in the Union of the United States and admitted *as soon as possible* * * * to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.

"*Florida.*—Identical with Louisiana.

"*Mexico.*—Mexicans who did not elect to retain their former citizenship should be incorporated into the Union and be admitted *at the proper time* (not immediately, *proprio vigore* of the treaty), to be judged of by the Congress of the United States, to the enjoyment of all the rights of citizens of the United States.

"*Alaska.*—The inhabitants who remain three years, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, etc., of citizens of the United States.

"*Porto Rico.*—Allows one year for Spaniards to elect to retain former citizenship, and provides that the civil status and political rights of the native inhabitants shall be determined by the Congress."

The treaty-making power of the Government has therefore exercised the right to deal with the status of the inhabitants of ceded territory in every treaty of cession from 1803 to 1898. The status fixed has not been uniform, but exceedingly varying.

The inhabitants of Louisiana and Florida were to be admitted to citizenship "*as soon as possible*," not immediately, but at a later date, impliedly to be fixed by Congress. But it has never been considered that this included *all* the inhabitants, but only the free inhabitants, and excluded the Indian tribes, though not so expressed.

The inhabitants of New Mexico and California were to be admitted to citizenship "*at the proper time*," not immediately, but at a proper time "*to be judged of by the Congress.*"

Alaskans who remained three years were admitted without further action by Congress or otherwise, but native tribes were excepted.

We find, therefore, great and varying discriminations in the treaties on this subject. No one of them admits all the inhabitants. None admits the inhabitants to immediate citizenship.

Those that guarantee citizenship to certain classes of the inhabitants—Louisiana, Florida, New Mexico, and California—do not grant it at once, but leave the declaration or promise of the treaty to be performed by Congressional act at a future day; "as soon as possible;" "at the proper time;" "to be judged of by the Congress."

This course of dealing with the inhabitants of ceded territory in the treaty of cession establishes beyond question that the Presidents and the Senates have always believed that the status of such inhabitants was a subject which could properly and constitutionally be settled by the treaty itself or referred to the subsequent action of Congress.

Such a practice is absolutely opposed to the doctrine that "the Constitution follows the flag," and that when territory is ceded to the United States the inhabitants become immediately *proprio vigore* citizens of the United States. If that doctrine be true, every treaty that has brought us new lands and new inhabitants has violated in this respect the principles of the Constitution. It convicts of error and usurpation Thomas Jefferson, James Madison, James Monroe, James K. Polk, Franklin Pierce, Andrew Johnson, their Cabinets, and the Senates that ratified their treaties.

NOT ONLY ARE THE EXECUTIVE AND SENATORIAL DIVISIONS OF THE GOVERNMENT COMMITTED TO AN UNVARYING PRACTICE OF POLICY WHICH IS OPPOSED TO THIS FALSE DOCTRINE, BUT THE WHOLE CONGRESS, SENATE AND HOUSE OF REPRESENTATIVES, AS A LEGISLATIVE BODY, HAVE INDORSED AND FOLLOWED THE PRACTICE AND TENET OF THE EXECUTIVE BY PASSING LAWS IN FURTHERANCE AND RECOGNITION OF THE TREATY PROVISIONS REFERRED TO, AND BY THE ADOPTION DURING THE HUNDRED YEARS OF LEGISLATION OF NUMEROUS ACTS EXTENDING THE CONSTITUTION AND VARIOUS LAWS OF THE UNITED STATES TO CEDED TERRITORY.

If Congress may properly define the classes of emigrant or aboriginal inhabitants who may become citizens, and the proper period of probation and the terms and conditions of admission, why is it unreasonable or unjust to leave to their judgment and discretion the time, the terms, and the conditions upon which the inhabitants of lately foreign islands may be admitted to the same high status?

Are the United States so bound and tied by this Constitution of ours that it can never acquire an island of the sea, a belt across the Isthmus, a station for a naval base, unless it be at the cost of admitting those who may happen to inhabit the soil at the time of the purchase to full rights as citizens of the Union, no matter how incongruous or unfit they may be, while the foreign-born inhabitant or the aboriginal red man must depend upon the grace of Congress, though he dwell half a century among us?

An independent nation might find it necessary or expedient to demand and receive a cession of conquered territory subject to a great variety of conditions, some of which we can now foresee and state, and others of which, in accordance with the varying changes in the world's condition in the course of events, may be unforeseen. It might be prudent to demand a conditional cession of territory by way of security for payment of indemnity for the cost of a war, and then we might be compelled to foreclose the mortgage and take an absolute title. It might be found necessary to take possession of a part of territory temporarily, in order to collect and apply the revenues, or a part thereof, for the benefit of the conqueror until the indemnity is paid, and again we might be required to foreclose that mortgage. Under the usual powers of national sovereignty, an independent government would have an undoubted right to resort to such a device, if advisable, and the territory would not thereby become a part of the acquiring nation.

It might be necessary or prudent, on account of international reasons, to agree that the ports of ceded territory should remain subject to special provisions or privileges granted by the ceding nation to other powers. It might be the case that the revenues are pledged to other nations as security for bonds, and it might be found expedient to affirm such an arrangement where it could not be disaffirmed without danger of foreign war or entanglements.

It might be found desirable to take over by cession a port or a country for a limited period, or for special purposes, as, for instance, the grounding of a cable or the construction of a canal across the Isthmus of Panama.

What reason can be suggested for denying to this nation such full power and discretion as are possessed by other nations in this respect? Why should the framers of the Constitution have wished to put shackles

on the national limbs, or to strip the nation of powers necessary to the preservation of its dignity and the maintenance of its material interests on an equality with the nations of the earth? The full exercise of these ordinary powers tends to the exaltation of the dignity, influence, and welfare of the Union. These powers are inconsistent with no principle of personal liberty. Why seek to needlessly limit and restrain the national functions? Why not rather, with the same largeness of view and purpose that characterized such statesmen as Jefferson and Marshall, seek, by liberal interpretation, to give broad and ample scope to the spirit of national development, looking forward, as Marshall expressed it, "to the ages to come," when newer, grander, and more potential opportunities for national growth and influence should have come to us than our fathers ever dreamed of?

It is within the undisputed power of our Government to exclude from its territory such aliens as it may deem undesirable. Why is it not equally within its power to define what persons may become citizens by cession of territory? What constitutional principle is violated?

What is there in the Constitution which differentiates this country from all others in the exercise of the right of territorial acquisition so as to bind us not to extend our possessions except upon the necessity of extending our citizenship?

There are thousands, yes, millions, of subjects, American subjects, within the States to-day who are not citizens of the United States.

Is it answered that by the spirit of our institutions a republic can not have subjects who are not also citizens? The proposition is denied. And the counter question is retorted, Why not?

To be called an American subject is no disgrace. The term does not imply anything as to the nature or form of the government of which one is a subject. It imports only that a person is within the protection and allegiance—either permanent or temporary—of a particular sovereignty; it may be imperial or it may be republican. It does not signify in any degree the grade or status of citizenship occupied by the person within the domestic economy of his sovereign.

Kent says:

> "We are, equally with the inhabitants of all other countries, *subjects*, for we are equally bound by allegiance and subjection to the government and law of the land." (2 Kent Com., 258, note.)

A subject is one under the protection of a government and owing it allegiance. This may be a complete and exclusive allegiance or a paramount allegiance, there remaining a subordinate allegiance to some subordinate sovereignty, as in the case of Indian tribes; or it may be only a temporary allegiance, as in the case of an alien emigrant not yet naturalized. The correlative of allegiance is not citizenship, but protection. Citizenship may be taken away as a penalty for crime, but allegiance is still due. The noncitizen subject may be constitutionally taxed. No one suggests that alien residents are not subject to our tax and revenue statutes. Indians living in tribal relations may be subjected to their operation, or they may be exempted, at the pleasure of Congress. (*The Cherokee Tobacco*, 11 Wall., 616.)

In an international sense subjects are the same as citizens, but in a domestic sense they may be entirely different.

The Constitution recognizes "persons" as well as citizens, but it confers privileges upon citizens which it denies to persons who are

not citizens, and it confers certain rights or capacities upon some classes of citizens that are denied to others. It distinguishes between native-born and foreign-born citizens in prescribing qualifications for certain offices. So that citizenship is not in all respects necessary to secure to persons in the United States certain of the immunities granted by the Constitution; while, on the other hand, citizenship does not carry with it the right to enjoy *all* the privileges which some American citizens may enjoy.

To those who contend that the duty of allegiance can be exacted by the United States from citizens alone, and to those who ask if the inhabitants of Porto Rico can commit treason if they be not citizens, let John Marshall answer.

Discussing the "Act for the punishment of certain crimes against the United States" (1 Stat., 112), he declared:

> "The first section relates to treason, and its objects are: 'Any person or persons owing allegiance to the United States.' This description comprehends only the citizens of the United States, *and such others as may be on its territory or in its service.*" (5 Wheat. Appendix, p. 12.)

Now it will be found, on studying the history of this country, that administrative construction by the Executive, Congressional action by legislation, and judicial decision all affirm that under our revenue laws every port in the ceded country is to be regarded as a foreign one until such laws are expressly extended by Congress to the new possessions. And right here arises the *law* question aside from the constitutional question in this case; the contention of the Government being that the act of 1897, the Dingley Act, classes as foreign all countries not within the understood limits of the United States at the time it was passed. It is a maxim that laws enacted by the legislature of any State or municipality bind only the inhabitants of such State or municipality. They have no extraterritorial effect or jurisdiction. So also of constitutional provisions. We search in vain through the Constitution and the first twelve amendments to find a single phrase or word indicating that that instrument was to have operation beyond the confines of the Union. But when we turn to the thirteenth amendment we find a variation of language and an extension of operation which is most remarkable and significant.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, *or any place subject to their jurisdiction.*

Subject to its power of government is meant by jurisdiction there; any place under its dominion, under its sovereignty, under its government; and nothing can be imagined that would fit that description except a territory which did not form a part of the United States.

I shall deal first with administrative and legislative interpretation of our tariff act. I have collated the history of administrative and Congressional action from the beginning of the Government under the Constitution down to the present time. We find, first, that Rhode Island and North Carolina, States that did not adopt the Constitution until after it had gone into effect and the Government had been formed, and which subsequently adopted it, were not considered even by that act to have come under the tariff laws, but Congress thought it necessary to extend, and did by express acts extend, the revenue laws to

those States. The same was true of Vermont. Louisiana was the first acquisition of territory, and the views of President Jefferson and Mr. Gallatin, the Secretary of the Treasury, are disclosed in their correspondence, and in the orders given to Governor Claiborne, the first governor of the Province of Louisiana. All the declarations of Jefferson on this subject are to the effect that to come under the operation of the laws of the United States, those laws must be expressly extended to the new acquisition. They did not believe, any of these gentlemen, that the laws of the United States had operation there until Congress declared that they should have. Mr. Jefferson selected certain acts to be immediately extended, and others to be extended from time to time. Writing to Gallatin, on November 9, 1803, he says:

> "The memoranda you inclosed me from Mr. Clarke deserve great attention. Such articles of them as depend on the Executive shall be arranged for the next post. The following articles belong to the legislature:
>
> "The administration of justice to be prompt. Perhaps the judges should be obliged to hold their courts weekly, at least for some time to come.
>
> "*The ships of resident owners to be naturalized, and, in general, the laws of the United States respecting navigation, importation, exportation, etc., to be extended to the ports of the ceded territory.*"

Here is something:

> "Without looking at the old Territorial ordinance (meaning the ordinance of 1787), I had imagined it best to found a government for the Territory or Territories of *lower* Louisiana on that basis. But on examining it, I find it will not do at all; that it would turn all their laws topsy-turvy."

What laws? The Spanish laws that remained in force.

> "Still I believe it best to appoint a governor and three judges, with legislative powers; only providing that the judges shall form the laws, and the governor have a negative only, subject further to the negative of a national legislature. The existing laws of the country being now in force, the new legislature will of course introduce the trial by jury in *criminal* cases first; the habeas corpus, the freedom of the press, freedom of religion, etc., *as soon as can be*, and in general draw their laws and organization to the mold of ours *by degrees* as they find practicable without exciting too much discontent. In proportion as we find the people there riper for receiving these first principles of freedom, Congress may from session to session confirm their enjoyment of them." (Writings of Jefferson, vol. 8, 275.)

Exactly the same idea expressed by Mr. Mitchill, of New York, in his speech in the House.

Gallatin, writing to Jefferson July 9, 1803, stated as his opinion that "all the duties on exports now payable at New Orleans by Spanish laws should cease, and all articles the growth of Louisiana which when imported into the United States now pay duty should continue to pay the same for at least such rates as would on the whole not affect the revenue."

Mr. Gallatin said he wanted goods brought from New Orleans into the United States to continue to pay duties at our ports, and, writing

to Governor Claiborne, who was about to start for his new post as governor of the new province, Gallatin instructed him, under date of October 31, 1803:

> "It is understood that the existing duties on imports and exports which by the Spanish law are now levied within the province will continue until Congress shall have otherwise provided." (Writings of Gallatin, vol. 1, p. 167.)

And that was done.

On February 24, 1804, Congress passed an act for laying and collecting duties on imports and tonnage within the Louisiana Territory.

In March, 1804, Congress passed an act erecting Louisiana into two Territories. This bill contained a bill of rights, conferring some, but not all, of the provisions contained in the bill of rights of the Federal Constitution; some, but not all, of the special privileges contained in the ordinance of 1787. It confined a trial by jury to cases in the superior court, for instance. Then it provided:

> "The laws in force in the ceded territory at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified, or repealed by the legislature."

That clause, I think, has been followed in every territorial act since. Gallatin wrote to Claiborne as follows:

> "It is understood that the existing duties on imports and exports, which by the Spanish laws are now levied within the province, will continue until Congress shall have otherwise provided."

And he issued an order to the collector at Fort Adams, saying:

> "That until otherwise provided for, the same duties are to be collected on the importation of goods in the Mississippi district from New Orleans, and vice versa, as heretofore."

The act of February 24, 1804, putting in force in Louisiana certain of the laws of the United States, used this significant language:

> "That so much of any law or laws laying any duties on the importation into the United States of goods, wares, and merchandise from the said Territories (or allowing drawbacks on the importation of the same from the United States to the said Territories), or respecting the commercial intercourse between the United States and the said Territories, or between the several parts of the United States through the said Territories, which is inconsistent with the provisions of the preceding section, *be, and the same hereby is, repealed.*"

That was in February, 1804, and yet Louisiana had been taken possession of in December preceding, and had been governed as a dependency of the United States, and Congress, in speaking of it in this act, distinguishes between the United States and "said Territory." That act applying the revenue laws was to take effect thirty days after its passage, and Gallatin issued an order, therefore, calling the attention of the governor and collector to the act, saying:

> "But as the act in question does not commence to be in force until thirty days after its date, articles which have been or may be thus imported before the 25th of March ensuing *must pay the same duties as heretofore.*"

In an act passed March 23, 1804, supplementary to an act to incorporate the subscribers to the Bank of the United States, it was provided:

> "That the president and directors of the Bank of the United States shall be, and they are hereby, authorized to establish offices of discount and deposit in any part of the territories *or dependencies* of the United States."

In 1790 Congress passed an act providing:

> "That the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court *within the United States* by the attestation. * * * And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court *within the United States.*"

When Louisiana was acquired, it was necessary to secure a like recognition in that territory for similar records, and to accomplish this, the Congress, in 1804, passed an act supplemental to the act of 1790, and this act specifically divided all territory under the sovereignty of the United States into three classes:

(1) States of the Union.
(2) Territories of the United States.
(3) Countries subject to the jurisdiction of the United States.

And the act provided that all the provisions of this act shall apply to the Territories of the United States, and the countries subject to the jurisdiction of the United States, as well as to the public acts, etc., of the several States. This classification is preserved to this day. In the Revised Statutes of the United States (sections 905, 906) it is provided that:

> "The acts of the legislature of any State or Territory, *or any country subject to the jurisdiction of the United States*, etc.
>
> "All records and exemplifications of books which may be kept in any public office of any State or Territory, *or any country subject to the jurisdiction of the United States*," etc.

Now the same course was taken with reference to duties on goods brought from Florida into the ports of the States when Florida was afterwards admitted by treaty; and a special order was made on this subject, which I need not read, but it is so stated by Chief Justice Taney in *Fleming* v. *Page;* and the precedents I have cited as to Louisiana and Florida were referred to by him, and held to be administrative precedents of value and importance, worthy to be read by the court, and, having read them, he pronounced them to be the correct construction of the law.

When the bill for the organization of Florida was pending in Congress, an amendment was offered providing that "all the principles of the Constitution of the United States, for the securing of civil and religious freedom, and for the security of property, and the sacredness of rights to things in action; and all the prohibitions to legislation, as well as with respect to Congress as the legislatures of the States, be, and the same are hereby, declared to be applicable to the said Territory as paramount acts."

That was, I think, the first attempt to extend the principles of the Constitution by legislative enactment to the Territories. In opposing

this amendment, an argument was made by Mr. Rhea of Tennessee, speaking for the Administration, representing the Administration party, taking issue with the correctness and propriety of this legislation, and the amendment was voted down. The bill was passed providing merely such a government for Florida as was described by Chief Justice Marshall in *American Insurance Company* v. *Canter*.

Mr. Benton, in his Abridgment, makes a pertinent comment on this fact:

> "This prompt rejection of Mr. Montgomery's proposition shows what the Congress of 1822 thought of the right of Territories to the enjoyment of any part of the Constitution of the United States. * * * The only question between Mr. Montgomery's proposition and the clause already in the bill was as to the tenure by which these rights should be held—whether under the Constitution of the United States or under a law of Congress and the treaty of cession. And the decision was that they should be held under the law and the treaty. Thus a direct issue was made between constitutional rights on one hand and the discretion of Congress on the other in the government of this Territory, and decided promptly and without debate (for there was no speech after that of Mr. Rhea on either side) against the Constitution. It was tantamount to the express declaration: 'You shall have these principles which are in the Constitution, but not as a constitutional right, nor even as a grant under the Constitution, but as a justice flowing from our discretion, and as an obligation imposed by the treaty which transferred you to our sovereignty.'" (Benton's Abridgment, vol. 7, p. 295, note.)

Andrew Jackson became, by appointment of the President, governor of Florida under this bill, and exercised many powers which would be properly declared arbitrary and despotic—all the powers formerly exercised by the Spanish intendant. In the course of the exercise of these powers he arbitrarily seized three persons who had refused to deliver over to him certain papers which he had demanded. This caused a sensation in the neighborhood, and a crowd of people resorted to the residence of Judge Fromentin, who was a Federal judge, appointed by President Monroe. They induced the judge to issue a writ of habeas corpus. When the writ was served, Jackson refused obedience to it on the ground that the Constitution had not been extended to Florida, and that the laws of the United States did not apply there, and he ordered the judge to appear before him for contempt, and a violent controversy arose, in which both sides appealed to Washington. The judge insisted that the inhabitants of Florida were entitled to the writ of habeas corpus by virtue of the treaty, and also because he thought the Constitution and laws of the United States were in force in Florida. In reporting this to the President, General Jackson expressed his opinion of a judge that would hold that kind of a view, and he said:

> "If it be not sufficient to strike him from the roll of judges, I must say that ignorance of law is no objection against anyone's holding a judicial station. Judge Fromentin was represented to me to be no lawyer, * * * but I could not have formed such an idea of his want of legal knowledge as this transaction displays." (Annals of Congress, first session Seventeenth Congress, vol. 2, p. 2300.)

In the same report Jackson also says:

> "The lecture I gave the judge when he came before me will, I trust, for the future, cause him to obey the spirit of his commission, aid in the execution of the laws and administration of the Government instead of attempting to oppose me."

That might, I suppose, be called despotic government. But Judge Fromentin was heard on the other side, and he wrote to the Secretary of State, John Quincy Adams, and said:

> "The American flag, it is true—the flag of liberty—waves on our forts; a treacherous sign in Florida. Sir, the bohon upas tree of slavery overshadows us. (Ibid., p. 2381.)
>
> "The question now to be decided is not the insignificant and unimportant question of the difficulty between General Jackson and myself. It is a question of country or no country, Constitution or no Constitution, liberty or slavery. The despotism which attacks the liberty of one of the meanest of the inhabitants of this country makes an attack upon the liberty of all. * * * I speak not this now with reference only to the present occasion. But, sir, tyrants beget tyrants. Beware!" (Ibid., p. 2472.)

In spite of this distracted appeal President Monroe and his Secretary of State, John Quincy Adams, sustained Jackson.

In spite of this appeal the matter was determined by conference between President Monroe and Secretary Adams, who replied to the judge in this way:

> "I am directed by the President to inform you that the laws of the United States relative to the revenue and its collection and those relating to the slave trade having been the only ones extended by act of Congress to the territories of Florida, it was to the execution only of them that your commission as judge of the United States was considered and intended to apply. *The President thought the authority of Congress alone competent to extend other laws of the United States to newly acquired territory;* nor could he give to the judge a jurisdiction which could only be conferred by them." (Annals of Congress, first session Seventeenth Congress, vol. 2, p. 2411.)

Attention is directed to the fact that in this instance three American statesmen, James Monroe, John Quincy Adams, and Andrew Jackson, each of whom was elected President of the United States, united in declaring officially that the Constitution did not apply of its own force to territory newly acquired by this nation by virtue of the act of acquisition, but that such extension must be accomplished by the action of Congress.

When Oregon was established as a government, Congress passed an act extending the ordinance of 1787 to its inhabitants, and expressly extending the revenue laws of the United States to it. A Territorial government was established for Missouri in 1812. It was not assumed by Congress that all the privileges, immunities, and guarantees of the Constitution extended there, because Congress proceeded specifically to pass an act in which a modified bill of rights, modeled somewhat after the bill of rights in the ordinance of 1787, was extended to the inhabitants of Missouri. And when Wisconsin was set up as a Territory the laws of the United States were by that act extended to the

Territory. When New Mexico was set up as a Territory in 1850, it was provided that the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within said Territory of New Mexico as elsewhere within the United States.

Now, if your honors please, we come to New Mexico and Arizona, and the question asked me yesterday by Mr. Justice Brewer. If the question had been whether when the United States acquired New Mexico it might make a treaty similar to the treaty of Paris, and deny by the treaty the privileges and immunities of citizens to the people of New Mexico—if that had been the question, I would say unhesitatingly they had that power. But by that treaty the Government solemnly pledged itself to receive as citizens the inhabitants of this section, and Congress ratified by act that solemn engagement with a foreign nation, and it never from that time to this has attempted to deny to any of those people any of those privileges. Besides that, the treaty of Guadaloupe Hidalgo used most peculiar language. It defined the "*boundaries of the United States*," expressly making this Territory retained within our side of the boundary a part of the United States and referring to it as such. But the laws of the United States were extended to New Mexico by statute. They did not operate there when it was formed as a Territory of their own vigor, and there never has been a day from the beginning of the Government to now where they have attempted to organize a territory out of lands acquired, that Congress has not thought it necessary to say specifically that one or more, or all, of the appropriate acts of Congress should be extended. Why do that, if they went there of their own force?

Similar legislation extending the Constitution and laws had been had with reference to Utah, Colorado, Idaho, Montana, Wyoming, and the District of Columbia.

Mr. Justice BREWER. If the Constitution and laws are once extended to these new territories, do you understand that they permanently remain in force, or that Congress can afterwards withdraw them?

The ATTORNEY-GENERAL. That, if your honors please, is a very serious question; but if they are extended there by virtue of a solemn stipulation in a treaty with a foreign nation, and if they are afterwards affirmed by an act of Congress following the treaty, I think it would be perfectly safe for this court—certainly it would be safe for the law officer of the Government—to say that that was an inviolable promise that nothing can break. It would be safe to say so. I think an argument could be made on the other side, but it is not necessary to discuss that.

Mr. Justice BREWER. Oklahoma was not included in that cession from Mexico. That was under the treaty of 1853. Oklahoma came to the United States by virtue of the provisions of the treaty of 1821 with Spain, and hence there was no cession. The laws of the United States and the Constitution were extended over Oklahoma. There was no stipulation in the treaty. Could Congress withdraw the Constitution and laws from the Territory of Oklahoma?

The ATTORNEY-GENERAL. That would depend, sir, on whether the view of the men who discussed that question first in 1803 was sound when they said this formed an inviolable compact in the treaty, affecting not only the other nations, but affecting, where extended without a treaty, the inhabitants. I suppose that no law of Congress could take

away from a citizen his rights of citizenship once conferred. Oklahoma being a Territory, it is possible, however—I am not arguing this, because I don't consider it necessary to the case in any way—it is possible, however, that if it has not been made definitely a part of the United States by any treaty or act of Congress, they might withdraw, not as to the present citizens who are made such, but, as to those in the future who become inhabitants, they might withdraw their guaranties which their promise has conferred. As a territory I presume the United States might in one way or another denude Oklahoma of inhabitants. It certainly could have done so once, and then it could have started anew. Just how that might be worked out, I have not considered, and I was unaware, until your honor stated it, that Oklahoma was not either within the Louisiana or the Mexican treaty. I supposed it was covered by compact with one or the other.

Mr. Justice HARLAN. Has Congress made any provision as to the applicability of the tariff act to this property?

The ATTORNEY-GENERAL. It says all the laws are extended, and that extends to the Territories—many of the former ones did. In the Louisiana act the tariff act was specifically extended by name. So in Florida.

Mr. Justice HARLAN. Were they extended?

The ATTORNEY-GENERAL. No, sir; by general provision in the Revised Statutes, all laws not locally inapplicable shall have the same force and effect in the organized Territories. It was within the power of Congress to withdraw the operation of the revenue laws from the Territories.

Mr. Justice HARLAN. Would it be necessary to extend them to Arizona, New Mexico, and Alaska when they come in as States?

The ATTORNEY-GENERAL. I think it would. I am coming to that later on.

Now the Northwest Territory. The history of that is well known, and the ordinance for its government is a public instrument of such notoriety that I need not refer to its provisions. That ordinance was framed and passed by the Congress of the Confederation, by the same men who were engaged at the same time in framing the Constitution of the United States. They knew that if the Constitution were adopted that Territory would belong to the newly formed government, or the continued government, and yet they formed a compact with the people of that government, a compact which Mr. Justice Baldwin thought was made obligatory under the Constitution, a compact which has been carried out. Now if these forefathers of ours who framed the Constitution thought the Constitution was going to govern and protect the inhabitants of the Northwest Territory in their rights, why did they deem it essential to make this solemn compact with them? If this action with reference to the ordinance of the Northwest Territory is to be accepted as a precedent, may we not approve of the wisdom of the members of that Congress, who in view of the possible future acquisition of territory deferred all questions concerning the rights and duties of the inhabitants, whether pagan, semicivilized, or civilized, of the unknown future possessions of the Union to the action of future Congresses, which should freely make the organic law for them as their Congress was making the organic law for the Northwest Territory, according to the future actual conditions and according to what a cen-

tury afterwards we of this day could see, and not according to what they with their limited foresight could anticipate?

Now the internal-revenue laws need not be universal in their application. They are not universal in their application; but the internal-revenue laws must be uniform throughout the United States; and if the United States means all the domain over which the United States exercises jurisdiction, then the internal-revenue laws ought to be uniform.

Mr. Justice BROWN. Have those laws been made to apply to Porto Rico and the Philippines?

The ATTORNEY-GENERAL. They have not.

The first internal-revenue tax on distilled spirits was levied in 1791, and divided the United States into fourteen districts, but did not apply to the Northwest Territory, and no districts were provided for there. This particular subject of revenue was allowed to go on unimpeded, and it was not until 1868 that the internal-revenue laws, and then only the laws as to spirits and tobacco, were extended to and applied to all places within the exterior boundaries of the United States.

I shall have something to say later on concerning this same subject. I only pause a moment to call attention to the proposition that territory may belong to or be under the jurisdiction of the United States within the purview of Congress, and according to its action, and not form a part of the United States, by referring to the legislation concerning the guano islands, which are held to appertain to the United States and to be under their jurisdiction, though they are not a part of the United States, and the revenue laws do not apply there, nor any except the criminal laws, which are made specially applicable.

Now, so much for legislative and administrative precedent. Starting back at the beginning, we find that nobody has ever assumed that a law of Congress applied to a Territory until Congress has said that it should be.

What about judicial decisions? In the case of the *American Insurance Company* v. *Canter*, when it was in the circuit court, before it came to this court, Mr. Justice Johnson delivered the opinion, and, discussing the relation which Florida then bore to the United States, he said that it seemed to him there was a material distinction between the territory now under consideration and that acquired from the aborigines within the acknowledged limits of the United States.

Then he refers to the action of Congress. He says:

> "We have the most explicit proof that the understanding of our public functionaries is that the Government and laws of the United States do not extend to such territory by the mere act of cession. For, in the act of Congress of March 30, 1822, section 9, we have an enumeration of the acts of Congress which are to be held in force in the territory, and in the tenth section an enumeration, in nature of a bill of rights, of privileges, and immunities, *which could not be denied to the inhabitants of the territory if they came under the Constitution by the mere act of cession.*
>
> "The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new States into the Union; and *the government of such acquisitions is, of course, left to the legislative power of the Union as far as that power is uncontrolled by treaty.*"

There is an idea that there may be treaty stipulations that are beyond the power of Congress to repeal.

> "By the latter we acquire either positively or *sub modo*, and by the former dispose of acquisitions so made; and in case of such acquisitions I see nothing in which the power acquired over the ceded territories can vary from the power acquired under the law of nations by any other government over acquired or ceded territory."

The decision of Mr. Justice Johnson was affirmed by this court.

In this case in this court the counsel were Mr. Whipple and Daniel Webster. A part of the argument of Mr. Webster is given in the report of the case.

> "*How* the Constitution became of force in Florida has not been shown. Was it by the act of cession? Is there any principle in the *law of nations* which upon the act of cession or conquest gives to the ceded or conquered country a right to participate in the privileges of the Constitution of the parent country? The *usages* of nations from the period of Grecian colonization to the present moment are precisely the reverse. Such a right never was asserted."

And then the Chief Justice delivered the now oft-quoted decision in that case, which I shall not weary the court by reading the second time. This is the conclusion:

> "These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the Territories of the United States."

And then we come to the case of *Fleming* v. *Page*. You will remember the facts in that case. Goods were imported from Tampico, Mexico, while it was in our possession as a conquest, into the port of Philadelphia, and duties were there charged under our tariff laws. Mr. Webster was counsel also in that case, and a part of his argument is given. He said there was a difference between the Territories and other parts of the United States, and referred to the decision in the Canter Case as to the judicial provision of the Constitution. Chief Justice Taney delivered the opinion. In it he said:

> "This construction of the revenue laws has been uniformly given by the administrative department of the Government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port; for after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department that goods imported from Pensacola

before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty; that is, that although Florida had, by cession, actually become a part of the United States, and was in our possession, yet under our revenue laws its ports must be regarded as foreign until they were established as domestic by act of Congress; and it appears that this opinion was sanctioned at the time by the Attorney-General of the United States, the law officer of the Government. And although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the seacoast. *The Department in no instance that we are aware of since the establishment of the Government has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of Congress.*"

Now, the Chief Justice may or may not have been absolutely correct in that statement. I have shown the court what the facts were. He was citing other administrative precedents that did not *compel* the decision of the court to conform thereto, but the decision of the court was based upon principle, though made conformable to administrative action. He said:

"The principle thus adopted and acted upon by the executive department of the Government has been sanctioned by the decisions in this court and the circuit courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say that there is no discrepancy between them. *And all of them, so far as they apply, maintain that under our revenue laws every port is regarded as a foreign one, unless the custom-house from which the vessel clears is within a collection district established by act of Congress and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States.*"

There was an authorative declaration of the approval of the acts of the administrations down to 1850. Is it not fair to say, if your honors please, that when Congress passed a law for raising revenue within the United States on foreign importations, it passed the law with that decision in its mind? Is it not fair to say that when we acquired Porto Rico, Congress would immediately have made provision for revenue laws in that island, so as to adjust and balance the system if it had not supposed that the decision of this court governed the case, and the Government was safe under that construction? Therefore, I say, we have a right to assume that Congress in passing the act of 1897 and subsequently permitting duties to be levied at the ports of New York on imports from Porto Rico for more than a year after we had obtained possession of the island intended to ratify and approve that construction, and did not intend that as soon as the treaty was ratified there should be a general change of the revenue laws of the new country;

and that Congress did mean that, and that it has ratified that view, appears from the act passed March 24, 1900 (which is not upon my brief), which provided that the amount of customs revenues received on importations by the United States from Porto Rico since the evacuation of that country by the Spanish forces on the 18th of October, 1898, to the 1st of January, 1900, together with any further customs revenue collected on importations from Porto Rico since the 1st of January, 1900, or that shall hereafter be collected under existing law, shall be placed at the disposal of the President, to be used for the government now existing and which may hereafter be established in Porto Rico, and for the aid and relief of the people thereof, and for public education, public works, and other governmental and public purposes therein until otherwise provided by law.

This statute is as specific an affirmation of the correctness of the course of the customs officers at New York in this case of Goetze as could possibly be made. It not only recognizes the correctness of the executive action of the Government up to that time, but refers to "*existing law;*" and there was not any existing law from which to collect revenue from Porto Rico at the port of New York, or other ports of the United States, unless it was the tariff act of 1897.

Counsel for Pepke refer to the case of *Pollard's Heirs* v. *Kibbe* (14 Pet.), and cite as the language of the court a paragraph from the opinion of Mr. Justice Baldwin. The opinion of the court was not delivered by Mr. Justice Baldwin, but by Justice Thompson. Justice Baldwin delivered a separate opinion, though concurring in the main opinion of the court.

But since counsel have quoted from Justice Baldwin's opinion a clause which they seem to think proves that the cession of territory to the United States brings it *ipso facto* under the Constitution it may be worth while to point out how mistaken they are in their deduction, and that the opinion of Mr. Justice Baldwin, instead of making weight for the argument of the appellant, is really confirmatory of the position of the Government in these cases. The paragraph of Mr. Justice Baldwin's opinion, which immediately precedes that quoted by the counsel on page 16 of their brief, is as follows:

> "By the third article of the Louisiana treaty the United States were bound to protect and maintain the inhabitants of the ceded territory 'in the free enjoyment' of their 'property' until they were incorporated into the Union, and when so incorporated to admit them 'to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.' *From the moment of such incorporation* the Constitution of the United States and its amendments interposed between the inhabitants and the legislative power of the United States the same guarantee which any citizen of any other State had a right to claim for the enjoyment of his property; and every proprietor, alien or citizen, had the same constitutional right to invoke the protection of the judicial power of the State or Union against the invasion of his rights of person or property wherever he might be located." (2 Peters, 235.)

To show what Mr. Justice Baldwin meant when he said in the paragraph quoted by counsel that the inhabitants became entitled to a threefold protection of the Constitution, the treaty, and the law of

nations, I call attention further to his opinion (14 Pet., 417) where he refers to the acts of Congress which applied the ordinance of 1787 to the Territory of Mississippi and the Territory of Orleans. The ordinance of 1787 he declares to have become a part of the Constitution by reason of the sixth article thereof, which says:

> "All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation."

Thus it appears that Mr. Justice Baldwin not only did not refer to the automatic operation of the Constitution in order to raise "this broad panoply" over the rights of the inhabitants of this territory, but he expressly sought for other grounds upon which to consider the Constitution as applicable to them, and found such grounds, first, in the incorporation of the territory into the Union; and secondly, in the extension of the ordinance of 1787 to the territory, that ordinance being, in his opinion, a compact rendered inviolable by the express provision of the Constitution.

We come now to the discussion of the case of *Cross* v. *Harrison*.

In transmitting to Congress copies of the treaty of peace between the United States and Mexico, July 6, 1848, President Polk declared to Congress that "the war with Mexico having terminated, the power of the Executive to establish or to continue temporary civil government over these territories, which existed under the law of nations whilst they were regarded as conqured provinces in our military occupation, has ceased. By their cession to the United States, Mexico has no longer any power over them, and until Congress shall act the inhabitants will be without any organized government. Should they be left in this condition, confusion and anarchy will be likely to prevail."

From this it appears that President Polk and his advisers were of the opinion that military government, rightly assumed and carried on during the continuance of the war, became, *ipso facto*, terminated when a treaty of peace was executed and ratified.

President Polk was wrong in this view, but notwithstanding this view of the President, the temporary government that was existing was not dissolved, but continued under those officers selected by the President or his subordinate, the President exercising the functions of commander in chief. Congress, although thus appealed to, did not pass any bill for the government of this Territory until September 9, 1850, when California was admitted as a State. They got into a deadlock on the subject of slavery and the question of extending the Constitution by specific act to the Territory, and that delayed the legislation that the President had asked for.

Now the status the Government maintained between the date of the treaty and the time California was admitted as a State was the subject that was before the court in the case of *Cross* v. *Harrison*. In that case the court expressly affirmed and approved the continuance of this temporary government set up by the military authorities over California, until Congress had legislated. It alludes to the fact that inasmuch as Congress did not pass any act on the subject, they must be taken as having assented to the continuance of such a government. The President might have dissolved it, and withdrawn the army, but

he did not do it and Congress did not do it. So it continued over the ceded territory under the law by which conquered territory is governed by the conquerer.

The claim of the plaintiffs in this case was threefold:

1. Duties paid by them on goods imported at San Francisco between February 3, 1848 (date of the treaty of peace), and May 30, 1848 (date of exchange of ratifications of treaty).

On this point the court determined that they could not have their money back, because California had not up to that time really been ceded, and there was really a condition of war existing, and they were subject to whatever imposition the local authorities put on them.

2. Then, next, was the question as to the duties paid on goods imported at San Francisco between the date of the exchange of the ratification and the date when the ratification was notified to the military government—a period of two or three months. They were collected under what we call the war tariff; not the revenue laws of the United States, but the war tariff, although the treaty had taken effect. The court held that they could not be recovered back.

> "The best test of the correctness of what has been said is this: That if such goods had been landed there duty free, they could not have been shipped to any other port in the United States without being liable to pay duty."

3. There then remained the claim for duties paid from August 7, 1848, to the time when the revenue system enacted by Congress for California was put into practical operation.

On this point, and as a summary of the decision on the whole case, the court say:

> "Our conclusion from what has been said is, that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason."

Having thus decided the case adversely to the contention of the importers on all points, the court proceeds to discuss the argument of their counsel that the laws of trade remain unchanged in a ceded country until a new sovereign changed them, which Congress had not done, in which references were made to what was done in North Carolina and Rhode Island and in Louisiana and Florida.

Several considerations are advanced in the opinion as calculated to answer this contention, among them the very obvious and sound and all-sufficient one, that California was a case of conquest, while the others were not.

Among the various suggestions made by the court in opposition to the aforesaid argument of counsel, was the much-quoted dictum:

> "By the ratification of the treaty California became a part of the United States. And as there is nothing differently stipulated

in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a duty on imposts and tonnage" (p. 197).

Finally the opinion declares:

"But we do not hesitate to say, if the reasons given for our conclusions in this case were not sound, that other considerations would bring us to the same result."

It will be perceived from a study of the case that the tariff law of the United States was not, in that instance, assumed to have been applied, of its own force, to the territory embracing California after the ratification of the treaty. The ratification of the treaty was proclaimed in California August 7, 1848. Up to this time an army officer had been the collector of duties, under a tariff prescribed and laid by the military governor of the Territory. On August 9, 1848, the collector was informed by Lieutenant Halleck, who was the so-called secretary of state of the civil government of California, that he would be relieved as soon as a suitable citizen could be found for his successor. He was also told that the tariff of duties for the collection of military contributions was immediately to cease, and that the revenue laws and tariffs of the United States would be substituted in its place.

This is the view taken by Halleck, who was the officer there, and who afterwards wrote his work on international law.

Now I come to another point.

The clause of the Constitution which declares that duties, imposts, and excises shall be uniform throughout the United States does not apply to nor govern these cases, because the term "United States," as there used, means only the territory comprised within the several States of the Union, and was intended only for their benefit and protection, and not for the benefit or protection of outside territory belonging to the nation; in the latter sense duties on imports from these islands are uniform throughout the United States, because they are uniformly imposed at every port in the United States, so that there is no preference given to the ports of one State over those of another, nor is any inequality between the several States created.

Mr. Justice WHITE. Suppose the United States acquired territory by a cession, and Congress passed an act providing for the government of that territory without any provision which could be construed as excluding it from the territory of the United States, and extended the Constitution and laws to it; does your claim go to the extent that Congress would then discriminate as to that territory by levying different taxes, so as to give that territory a preference over all the States, and give them a superior benefit which the States can not enjoy?

The ATTORNEY-GENERAL. Congress is doing it all the time as to the internal-revenue laws, and as to direct taxes. It is expressly decided in the case of *Loughborough* v. *Blake*, by Chief Justice Marshall, that a direct tax need not be imposed on anything except on all the States; and if a direct tax need not, neither need customs, revenues, or imposts or excises, and they are not, as a matter of fact. They are not imposed in the Indian Territory.

Mr. Justice WHITE. The Indian Territory is particularly referred to in the Constitution, and they come under a different power.

The ATTORNEY-GENERAL. They were not extended to any of the Territories until 1868. As a matter of fact, the Northwest Territory

did not pay internal-revenue taxes when the States did. I want it distinctly understood, if your honors please, that I do contend that there is no necessity for taxing the Territories and the District of Columbia—no constitutional necessity. That you may exempt them; and since we have come to that permit me to refer with some detail to the case of *Loughborough* v. *Blake*, which has been cited as authority on the other side. It is nothing of the kind. The question in that case was not a question of restriction, but a question of the extension of power. The question was: Can Congress impose a direct tax on real estate in the District of Columbia? The plaintiff contended that it could not; so the question was, Could Congress tax the District? The court decided that it could, but the court also decided that it did not need to.

Now, let us follow for a moment, if the court please, the argument of the Chief Justice. The Constitution gives to Congress the "power to lay and collect taxes, duties, imposts, and excises." "This grant is general, without limitation as to place." That is to say, it would cover the District of Columbia and the Territory. "It, consequently, extends to all places over which the Government extends. If this could be doubted, the doubt is removed by the subsequent words, which modify the grant. These words are, 'but all duties, imposts, and excises shall be uniform throughout the United States.' It will not be contended that the modification of the power extends to all places to which the power itself does not extend."

Of course not. Nobody would contend that limitation on a power did not extend where the power itself did not extend. But the next statement of the Chief Justice is a palpable non sequitur: "The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised throughout the United States." Now, that does not follow at all. If the Constitution had expressly said: "But all duties, imposts, and excises shall be uniform throughout the different States," nobody would claim that the first branch of it did not confer power to tax more than the several States. The limitation may be much less than the grant on which it is a limitation. "Since, then," he says, "the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extend throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States. The extent of the grant being ascertained, how far is it abridged by any part of the Constitution?"

Then he refers to the apportionment provision:

> "The object of this regulation is, we think, to furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part of our country.
>
> "As the direct and declared object of this census is to furnish a standard by which "Representatives and direct taxes may be apportioned among the several States which may be included within this Union," it will be admitted that the omission to extend it to the District or the Territories would not render it defective. The census referred to is admitted to be a census exhibiting the numbers of the respective States. It can not, however, be admitted that the argument which limits the application of the power of direct taxation to the population contained in this census is a just one. The language of the clause does not imply this restriction.

"If, then, a direct tax be laid at all, it must be laid on every State, conformably to the rule provided in the Constitution. Congress has clearly no power to exempt any State from its share of the burden. But this regulation is expressly confined to the States, and creates no necessity for extending the tax to the District or Territories. The words of the ninth section do not in terms require that the system of direct taxation, when resorted to, shall be extended to the Territories, as the words of the second section require that it shall be extended to all the States. They, therefore, may, without violence, be understood to give a rule when the Territories shall be taxed, without imposing the necessity of taxing them."

That is to say, when you do tax a Territory, it must be uniform. That is, uniform on the property or people to whom it is applied.

"If, then, the language of the Constitution be construed to comprehend the Territories and District of Columbia, as well as the States, that language confers on Congress the power of taxing the District and Territories as well as the States."

"But it is contended," he says further, "that this power must be limited by that great principle which was asserted in our Revolution, that representation is inseparable from taxation," and he continues:

"The difference between requiring a continent with an immense population to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings, and permitting the representatives of the American people, under the restrictions of our Constitution, to tax a part of the society which is either in a state of infancy advancing to manhood, looking forward to complete equality as soon as that state of manhood shall be attained, as is the case with Territories—"

That was the Territories then of the Northwest—

"or which has voluntarily relinquished the right of representation and has adopted the whole body of Congress for its legitimate government (like the District of Columbia), is too obvious not to present itself to the minds of all. Although in theory it might be more congenial to the spirit of our institutions to admit a Representative from the District, it may be doubted whether in fact its interests would be rendered thereby the more secure; and certainly the Constitution does not consider their want of a Representative in Congress as exempting it from equal taxation.

"If it were true that, according to the spirit of our Constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts, and excises within this District? If the principle of liberty and of our Constitution forbid the raising of revenue from those who are not represented, do not these principles forbid the raising it by duties, imposts, and excises as well as by a direct tax? If the principles of our Revolution give a rule applicable to this case, we can not have forgotten that neither the stamp act nor the duty on tea were direct taxes."

Now, does not that show specifically that the power to tax the District and the Territories which the Chief Justice derived from that

clause of the Constitution, was exercisable, but was not compulsory? It seems to me, if the court please, that the power to tax outlying dependencies within the jurisdiction of the United States might be derived from another clause of the Constitution than from that one. That clause of the Constitution was meant to regulate taxation among the States and preserved their rights one against the other, while the power to govern territory under the territorial clause of the Constitution necessarily carried with it the right to impose taxes to carry on the Government.

Mr. Justice HARLAN. "The power, then, to lay and collect duties, imposts, and excises, may be exercised, and must be exercised throughout the United States." What does he mean "must be exercised throughout the United States?"

The ATTORNEY-GENERAL. He can not mean anything except the States, because he afterwards says it does not need to be exercised.

Mr. Justice HARLAN. But he says, immediately after that, "the District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania."

The ATTORNEY-GENERAL. Perfectly true, and yet the other is true, just as I read it. Let us have it read again. "Congress has clearly no power to exempt any State from its due share of the burden. But this regulation is expressly confined to the States, and creates no necessity for extending the tax to the District or Territory."

Mr. Justice WHITE. That refers to direct taxes.

Mr. Justice HARLAN. Does that refer to the second section?

The ATTORNEY-GENERAL. He is referring to the words of the ninth section, which he says "do not in terms require that the system of direct taxation, when resorted to, shall be extended to the Territories."

Mr. Justice HARLAN. That is not the section here in controversy, but section 8. The second section is about a capitation tax.

The ATTORNEY-GENERAL. Of course the only thing involved in that tax was the direct tax on the District of Columbia.

Mr. Justice HARLAN. I call your attention to it to get your view upon it, to get the scope of that decision.

The ATTORNEY-GENERAL. There is no difference in its origin and in the reason for its adoption between the provision for direct taxes and that for duties, imposts and excises; none whatever. They were both provided, arranged, and adjusted to protect the States against inequality at the hands of Congress. They had no other motive; they sprang from no other cause; they were a part of the same original collocation in the draft of the Constitution.

Why should Congress not have the right to tax the territory of the United States according to what in their judgment they think is right? It was not the rights of the territory that they were seeking to guard by the compromises and adjustments of the Constitution. All the authority of the United States is derived from the people of the States. The people of the Territories do not and can not share in political authority. Only the States elect Congressmen and Senators. Congress alone can make laws for the government of the whole nation. A republican form of government is guaranteed only to the States. Outside the area of the United States, considered as a union of States, there is no political power, no guaranty of republican government, no pledge against local discriminations by way of port charges and regulations of commerce, or revenue, or a tax on imports.

Mr. Justice HARLAN. Do you think there is no limitation on that clause, or of want of power in Congress to establish a form of government that is not republican.

The ATTORNEY-GENERAL. I think so. They have gone on and established territorial governments which are not republican.

Mr. Justice HARLAN. Where?

The ATTORNEY-GENERAL. In Alaska.

Mr. Justice HARLAN. Why do you say that?

The ATTORNEY-GENERAL. Simply because there are no representatives there, no form of an organized territory; nothing but a government through the administration of the courts and its officers and the revenue officers of the United States, who are representing not the will of the people, but the laws of the United States, for the collection of its revenues and the enforcement of such statutes as may apply. If that is a republican form of government, where the people have no right to elect a single officer, or to form a city, or to establish a police system or anything whatever for their own protection having the sanction of law, then I am sure I have misunderstood the definition of republican government.

Mr. Justice BROWN. Has the governor no legislative power?

The ATTORNEY-GENERAL. None, whatever.

Mr. Justice BROWN. Is there no legislative power there?

The ATTORNEY-GENERAL. None, whatever. You can not form a city there; you can not create a municipal corporation; there can not be an appointment of any officer except to an office created by act of Congress, such as a judge or marshal; the governor has no power to appoint anybody.

Mr. Justice BROWN. A governor of a crown colony has certain legislative powers.

The ATTORNEY-GENERAL. Yes, varying, according to the charter granted by the Crown; some more than others. They have certain legislative powers; some have and some do not have.

Mr. Justice WHITE. There never was any act passed by Congress extending the Constitution and laws over Alaska, was there?

The ATTORNEY-GENERAL. Nothing except the general statutes. I have it in my brief, but I will not read it now, a general territorial act. An act was passed in 1868 to extend the customs laws of the United States, etc.—a specific act—and then the general territorial act; but that only applies to organized territory. The general laws of the United States do not apply to Alaska, because it is an unorganized territory, and so specified.

Mr. Justice HARLAN. Do you say that it is within the power of Congress to establish titles of nobility there?

The ATTORNEY-GENERAL. I do not think, if your honors please, that that is a territorial question, any more than is the question as to whether Congress can grant titles of nobility here. That relates not to territory. It is an inhibition on the power of Congress located here in the capital. Your honor put to me the question yesterday, as to the power of Congress to grant titles of nobility. That is a matter purely without local habitation. If it didn't exist, Congress might confer titles of nobility on foreign subjects out of the jurisdiction of the United States. But I have no doubt that the positive inhibitions that are not territorial in any sense, on the power of Congress to do certain things, whenever they can be directed to the Territories as a local thing, are

still inhibitions. The thing they can do here, they can do, no matter whether the subject is one place or another. Congress can make laws to be observed in foreign countries. There is no doubt of that. If our army is sent into a foreign country, the laws governing its subsistence, its pay, the appointment of officers, and everything else which does not interfere with the absolute authority of the Commander-in-Chief as such, can be regulated by law made in Washington and carried out in the foreign country. In the same way, the conduct of our consuls and representatives in foreign countries is regulated by laws enacted here, but carried out there. And some ask how can the President of the United States make laws for the Philippine Islands, if that is not a part of the United States—how can they be subject to this country in any way?

Mr. Justice BROWN. I suppose the Articles of War apply there.

The ATTORNEY-GENERAL. Certainly, they do apply; but the American Army is governed by the laws of the United States, not as to the commands which the commander will give in directing its operation, but the laws which properly govern the Army govern it wherever it is, just as they govern consuls and ministers wherever they are, and yet the Constitution does not extend into the foreign countries. But the law follows the subjects—the Army and individual soldiers—and is binding on them there as the servants and officers of the United States.

But I must hasten on. I have referred to the case of *Knowlton* v. *Moore*—it is familiar to your honors—as going to show that as to imposts, duties, and excises uniformity throughout the United States was historically meant to protect the States against inequalities put upon each other before the Constitution was adopted. It was intended to stop this and to make all indirect taxes uniform throughout the United States. There wasn't any reason why that should apply to the Territories. They were to be governed by the discretion of Congress. I shall not continue on that subject, but will ask your honors to look at what I have said in my brief. I have practically covered that in my other remarks.

I have referred to the Cherokee Tobacco Case, in which Mr. Justice Swayne delivered the opinion. This is a case where a tax was laid on tobacco and spirits produced in the Indian Territory. He says: "As regards these articles only, the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessity. Is it unreasonable that this small portion of it shall rest upon these Indians?" The right of exemption was claimed under a treaty which, it was contended, was not repealed by the act of Congress. Now, your honors have suggested that the Indians stand on a different basis. Well, as to the imposition of internal-revenue taxes, why do they stand on a different basis? This is not commerce with the Indians. This was not under the interstate-commerce clause, but under the revenue clause, and this court has held we have the power to tax the products of the Indian Territory if we see fit. Now, where do we get that power? We must get it from the Constitution in some way. And if that power may be exercised, but does not need to be exercised, then is not the same thing true as to any other class of persons? There is no designation in the Constitution of the nationality or condition of citizenship of anybody who is taxed; none whatever. As I said at the outset of this case, taxes are impersonal.

I have pretty nearly covered the other point of my argument—that the Constitution does not, of its own force, extend over acquired territory. I have included in my brief a very full abstract of the debate that occurred in the Senate over the proposition to extend the Constitution and laws of the United States to California. I have shown what Senator Dayton said, what Senator Walker said, what Senator Butler, of South Carolina, said; what Mr. Webster, Mr. Calhoun, and Stephen A. Douglass said. And your honors know that the reason lying at the bottom of the advocacy of that automatic operation of the Constitution was slavery. And then I have collected the decisions of this court with reference to trial by jury in the Territories, and have demonstrated, I think, that none of them establishes the contention that such right extends to the Territories by the automatic operation of the Constitution, believing that the statement of Mr. Justice Brewer in *American Publishing Company* v. *Fisher* represents exactly the state of the law. "Whether the seventh amendment of the Constitution operates *ex proprio vigore* to invalidate the statute may be a matter of dispute."

Now, the Constitution and the amendments do not pretend to secure to all persons within the United States the same kind of rights. There may exist within one State a right to a presentment by a grand jury and a trial by a petit jury, and in another jurisdiction across the line those guarantees of liberty (as they were formerly conceived to be) may be utterly absent. A man may be presented by information for murder in California and be hanged without any assembling of a grand jury or an indictment found, and it violates no provision of the Federal Constitution. What essential injustice, then, if it should be held that these provisions of the Constitution with reference to trial by jury were intended only for those that have the system of the common law, under which they arise and by the procedure of which they are alone enforceable? It is not to be conceived that Congress will give a less equitable mode of establishing justice in a Territory than the States will give to themselves in their domestic concerns.

Now, how and in what spirit should this Constitution of ours be interpreted? A practical construction of it nearly contemporaneous with its adoption, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind on a question of the interpretation of that instrument. In the case of *Field* v. *Clark* (143 U. S., 691), the court declares:

> "The practical construction of the Constitution as given by so many acts of Congress and embracing almost the entire period of our national existence should not be overruled unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land."

In the case of *Lithographic Company* v. *Sarony* (111 U. S., 57), Justice Miller said:

> "The construction placed upon the Constitution by the first act of 1790 and the act of 1802 by the men who were contemporary with its formation, many of whom were members of the convention that framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century it is almost conclusive."

In the Senate, and voting with the Administration party on the Louisiana treaty and legislation relating thereto, were Jonathan Dayton, of New Jersey; Pierce Butler, of South Carolina, and Abram Baldwin, of Georgia, all three of them members of the convention that framed the Constitution. Jefferson was President and Madison Secretary of State. Alexander Hamilton and Gouverneur Morris were still living, and commended the purchase.

Justice Story, in *Martin* v. *Hunter's Lessee* (1 Wheat., 326), discussing the principle of construction to be applied to our Constitution, expressed himself thus:

> "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers as its own wisdom and the public interests should require."

Chief Justice Marshall, in *Cohens* v. *Virginia*, declared that our Constitution was framed for ages to come, and designed to approach immortality as nearly as human institutions can approach it.

In *Holden* v. *Hardy* (169 U. S., 366, 385), Mr. Justice Brown, speaking as to a case claimed to arise under the fourteenth amendment of the Federal Constitution, declared:

> "This court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure which at the time the Constitution was adopted were deemed essential to the protection and safety of the people or to the liberty of the citizen have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests.
>
> "Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society.
>
> "In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws,

and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system which represented the growth of generations of inhabitants a jurisprudence with which they had had no previous acquaintance or sympathy."

In so far as any fugitive expressions in former opinions of this court may seem to conflict with the position maintained by the Attorney-General on behalf of the United States in these cases, they are to be weighed and valued only in accordance with the wise and just rule of interpretation formulated by Chief Justice Marshall in *Cohens* v. *Virginia:*

> "It is a maxim not be disregarded that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case"—

As he seems to have done in *Loughborough* v. *Blake*—

> "they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for judgment."

In the case of *Genesee Chief* the ancient rule which confined the maritime and admiralty jurisdiction of the United States to tidal waters was departed from, on the express ground that the great importance of the question, in view of the later growth and expansion of the country, was not appreciated or understood, Chief Justice Taney saying:

> "It is the decision in the case of the *Thomas Jefferson* which mainly embarrasses the court in the present inquiry. [That was a case decided by Mr. Justice Story, which the Chief Justice concurred in.] We are sensible of the great weight to which it is entitled. But at the same time we are convinced that if we follow it we will follow an erroneous decision into which the court fell when the great importance of the question, as it now presents itself, could not have been foreseen, and that the subject, therefore, did not receive the deliberate consideration which at this time would have been given it by the eminent men who presided here when the commerce on the rivers of the West and on the lakes was in its infancy and of little importance and but little regarded compared with that of the present day." (12 How., 443.)

Is not this a similar case? Is not this a case where new events, crowded and pressed upon us against our will, have seemed to require from the Government that it should strike and maintain an attitude which, while possibly in advance, was not in conflict with the conduct and precedent of our forefathers?

I have endeavored in this imperfect way to support the action of the Executive and Congressional branches of the Government in dealing with these momentous questions; grave and difficult they have always appeared to me to be; but I feel a serene confidence when I reflect that nothing that I have advised, that nothing the Government has done, but has had its precedent and its forerunner in the action of such men as Thomas Jefferson, and James Madison, and James Monroe, and Andrew Jackson, and Albert Gallatin, and the other great men of their day and generation. That nothing has been done except in accordance

with the doctrine and principle declared in the case of *Fleming* v. *Page* by the great Chief Justice of that day. That nothing has been done or thought of which was not believed to tend toward the extension, the exaltation, and the greater glory of our country, and the greater benefit and progress and improvement of the new peoples who have come under our control.

We have not sought a doctrine which by subtle disputation would entangle and embarrass. We have remembered that a great world power, extending its domain from the frozen seas on the North to where the encircling palm trees grow in the Pacific islands, must not be bound by rules too strict or too confining; that what might tend toward progress and development in one place might only hamper in another. Therefore we have sought an interpretation which should continue in the great legislative body which represents the American people that wise and sound discretion which it would be a slander and an imputation upon our country for a moment to believe they would not always exercise. And confidently might we trust that, actuated only by wise and honest and patriotic purpose, representing as they do only for a little while "the people" by whom they are chosen, and by whom they can quickly be displaced, they should seek not only to work out the highest welfare and advancement of the States and the people they represent, but also to bring these other peoples (as Congress and the Administration, I submit, have tried to do) into the lines of progress and development, so that the day might be hastened when we can give them more than the Constitution demands or requires, when we can give them self-government—that which the people of the District and the Territories by the decision of this court, and admission of counsel, are not entitled to under the Constitution; when we can give some of them, perhaps, a place in the galaxy of States. We have endeavored, as I said, to work not only for the honor and glory and welfare of our people, but to follow a course of enactment and administration that shall increase the comfort, the enlightenment, and the general welfare of every new inhabitant who stands under the protection of the American flag.

I thank your honors for your very patient attention.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

ELIAS S. A. DE LIMA ET AL., PLAINTIFFS IN ERROR, v. GEORGE R. BIDWELL.

No. 456.

SAMUEL B. DOWNES ET AL., PLAINTIFFS IN ERROR, v. GEORGE R. BIDWELL.

No. 507.

HENRY W. DOOLEY ET AL., PLAINTIFFS IN ERROR, v. THE UNITED STATES.

No. 501.

HENRY W. DOOLEY ET AL., PLAINTIFFS IN ERROR, v. THE UNITED STATES.

No. 502.

CARLOS ARMSTRONG, APPELLANT, v. THE UNITED STATES.

No. 509.

ARGUMENT OF THE ATTORNEY-GENERAL.

THURSDAY, *January 10, 1901.*

May it please your honors: It is not my purpose to go over again the extensive line of argument that I addressed to the court on a former occasion. What I shall say now is intended to be supplementary to the remarks and suggestions I then addressed to the court. I shall pay more specific attention to some considerations that have been more especially brought to the notice of the court by the peculiarities of these particular cases, and by the suggestions that have been thrown out with reference to the general question by the additional counsel who have been heard in opposition to the Government.

As supplemental to the historical citations given to the court in the argument of the Goetze case, and the case of the Fourteen Diamond Rings, I desire to refer to a passage from a letter of John Quincy Adams, when Secretary of State in 1821, to Baron de Neuville, the French minister, where, discussing the seventh clause of the Louisiana treaty, Mr. Adams said: "That stipulation both in letter and spirit is in all its parts special and not general."

This seventh section was the one which gave a special preference to vessels and goods of Spain, and vessels and goods of France, at the ports of Louisiana for the period of ten years.

"The whole transaction," says Mr. Adams, "refers to Louisiana, *as distinct from and not as a part of this Union.* The seventh article stipulates for special favors in its ports for a term of years, to the exclusion of other nations."

"The objection was strongly urged that this stipulation was incompatible with the provision of the Constitution which forbids any preference to be given by regulation of commerce or revenue to the ports of one State over those of another. To this objection the speeches from which I have cited passages were the answers, and they all constantly assumed the principle that the prohibitive injunction of the Constitution was not incompatible with the stipulation of the treaty, because Louisiana was not acquired as a State, but as a Territory; *so that while she continued in the territorial or colonial condition regulations of commerce different from those prescribed for the States of the Union might be established in her ports without contravening the Constitution.*"

The Secretary of State of the United States expressly in this correspondence with a foreign Government put our Government upon that basis.

Another matter which I desire to add to the historical elucidation of this question relates to our Western territory. It will be remembered that the Northwest Territory, so called, had been ceded to the Confederation prior to the adoption of the present Constitution, and the ordinance of 1787 had been prepared and agreed to by the Congress of the Confederation prior to the adoption of the Constitution, its preparation having been contemporaneous with the preparation of the draft of the Constitution. It will be remembered that the Congress of the United States, under the Constitution, ratified substantially the ordinance of 1787 by an act which seemed to accept it in all parts, providing only for this difference—that the reports which, by the ordinance, were to be made by the territorial officers to the Congress of the Confederation were afterwards to be made to the President of the United States, and that the appointments to be made and the commissions to be issued under the Constitution should be issued by the President, instead of by the Congress of the Confederation, as provided in the ordinance. That was the only modification made by the act.

Now, it is a fact that at the time the Constitution was adopted, at the time the ordinance was adopted, at the time the act of Congress which adapted the ordinance to the Government under the Constitution was passed, all of the States had not transferred to the United States their territory, and it was not until 1790 that North Carolina ceded her western territory to the United States. Here is a circumstance in the history of the relation of territory to the States and to the United States of very great importance. The territory which North Carolina ceded in 1790 had been territory forming, not a part of the State of North Carolina, but territory *belonging to* the State of North Carolina. It was not organized territory. There was no division of it into counties or townships, no provision for representation in a State legislature. It was regarded as property, outside of the State, but belonging to the State. Now, North Carolina ceded this by a deed, and Congress accepted the cession by an act in which the deed is recited. The deed contained stipulations expressing the terms upon which the United

States accepted the cession of the territory, stipulations similar to those that were contained subsequently in the Louisiana treaty, in the treaty with Mexico, and in the treaty with Florida, relating to the status and the rights of the inhabitants, which would have been absolutely unnecessary if the mere act of cession had made this territory a part of the United States, its inhabitants citizens of the United States and entitled to the rights of citizens of the United States. One other term of the deed which Congress accepted in full was "That the territory should be laid out and formed into a State or States, the inhabitants of which shall enjoy all the privileges, benefits, and advantages set forth"—in what? The Constitution of the United States? Not at all. "In the ordinance for the government of the western territory of the United States; that is to say"—the deed goes on in explanation—"whenever the Congress shall cause to be officially transmitted to the executive authority of that State an authenticated copy of the act to be passed by the Congress, accepting the cession of territory made by virtue of this act, and upon the express conditions hereby specified, and the said Congress shall at the same time assume the government of the said ceded territory, which shall be executed"—how? According to the principles of the Constitution of the United States? Not at all. To be executed "in a manner similar to that which they support in that part of the territory west of the Ohio; shall protect the inhabitants against enemies, and shall never bar or deprive them of any privileges which the people of the territory west of the Ohio enjoy."

The language forces us to the conclusion that those who made the cession and those who accepted it were under the impression that they were establishing a status different from that which would prevail between the United States and Territory which was to be made in a strict sense a part of the United States, and a different rule of government for the inhabitants from that which the Constitution would impose upon citizens of the United States. This act will be found in 1 Stat., page 106.

In my former argument I quoted some expressions of Thomas H. Benton that were important, both as a statement of historical fact and as an expression of strong opinion and reasoning. Mr. Benton was for thirty years a member of the United States Senate from the State of Missouri, which was formed out of the Louisiana purchase. His views on the general question under discussion were strong and positive. His long service in the National Legislature, his familiarity with the course of public events, increased to an unusual degree by his practice of recording for publication the incidents of political and legislative discussion, his great ability as a constitutional lawyer, and his patriotic devotion to the spirit of liberty and to the best interests of our country, render his opinions and statements of superlative value. I recently came across a little book put forth by him in 1857, which seems to be uncommon in the libraries, entitled "A Historical and Legal Examination of the Dred Scot Case," in which Mr. Benton refers to the history of the formation of the Constitution, and expresses the views of statesmen like himself and William L. Dayton and Daniel Webster on the controversy that agitated Congress and the country from 1848 to the time of the outbreak of the civil war. And speaking of the history of the formation of the Constitution, Mr. Benton says:

"Who were the parties to it? The States alone. Their delegates framed it in the Federal convention; their citizens adopted

it in the State conventions. The Northwest Territory was then in existence, and had been for three years; yet it had no voice, either in the framing or adopting of the instrument—no delegate at Philadelphia, no submission of it to their will for adoption. The preamble shows it was made by States and for States. Territories are not alluded to in it. The body of the instrument shows the same thing, every clause, except one, being for States; and Territories, as political entities, never mentioned once; and the word 'Territory' occurring but once, and that as property, assimilated to other property—as land, in fact, and as a thing to be disposed of—to be sold. Now, you never sell a Territorial government, but you sell property; and in that sense alone does the word 'Territory' occur, and that but once in the whole instrument. Tried by the practice under it, and the Territory is a subject, without a political right—no right to vote for President or Vice-President, or Senator or Representative in Congress, nor even to vote through their Delegate on any question in Congress—all their officers appointable and removable by the Federal authority, even their judges—their Territory to be cut up as Congress pleases; even parts of it to be given to Indians; no political rights under it, except as specially granted by Congress; no benefit from any act of Congress, except specially named in it, or the act specially extended to them, like the subject colonies and dependencies of Great Britain. How can the Constitution go to them of itself, when no act of Congress under it can go to them unless specially extended? Far from embracing these Territories, the Constitution ignores them, and even refuses to recognize their existence where it would seem to be necessary, as in the case of fugitives from service and from labor. * * *

"The whole Constitution was carried out upon the principle of ignoring the existence of Territories. I speak of Territories, implying political existence and organization, in contradistinction to territory signifying land, and repeat that, as political entities, the Constitution ignores them."

Referring to the act for the government of the Louisiana Territory, Mr. Benton declares (this was the bill passed in 1803, putting the whole power of the government in the President):

"The bill thus passed received the approbation of the President the same day it was laid before him; and to those who are acquainted with the working of the legislative machinery it may well be believed that the whole proceeding was in concert with the Administration; that Mr. Jefferson picked out Mr. Breckenridge to bring in the bill; that its principles were settled in Cabinet meeting; that Mr. Madison drew it, and that every question in relation to it was duly considered before it was submitted for final action. And thus this first instance of Congressional legislation upon newly acquired territory was as high an instance of disregard of the Constitution as the imagination could conceive, being nothing less than the continuation of the Spanish regal despotism; the President taking the place of the King of Spain; Governor Claiborne, the place of the intendant-general, Morales; the laws of Spain remaining in force and administered by Ameri-

can judges, and the whole provincial administration going on as if no change of government had taken place. It was a royal despotic government, and everybody knew it, and no one thought of testing it by the Constitution (some few new members in the House excepted) any more than by the Koran.

"And now for the men who passed these acts—who established these governments—so incompatible with the Constitution and so fully asserting absolute power over this new territory. Who were they? They were the men of the Revolution—of the ordinance of 1787—of the Constitution of that year—of the first administration of the Federal Government in its early ages—and the authors of the acquisition of Louisiana. Mr. Jefferson was President, Mr. Madison Secretary of State, and the two Houses of Congress filled with men who had acted their good part in founding and in putting into operation the new Federal Government. These were the men who did these things and who ought to be allowed to know something of their own work; and, if they did not, somebody existing at the time ought to have known of the dreadful usurpations and proclaimed them to the world. No such discovery was made."

And speaking of the *proprio vigore* extension of the Constitution to territory carrying slavery with it, Mr. Benton said:

"Mr. Calhoun declared the effect of it when he proclaimed it, saying: 'I deny that the laws of Mexico can have the effect attributed to them—that of keeping slavery out of New Mexico and California. As soon as the treaty between the two countries is ratified the sovereignty and authority of Mexico in the territory acquired by it becomes extinct, and that of the United States is substituted in its place, conveying the Constitution with its overriding control over all the laws and institutions of Mexico inconsistent with it.'

"This [says Mr. Benton], is the declared effect of the transmigration of the Constitution to free territory by the author of the doctrine: and great is the extent of the country, either acquired or to be acquired, in which the doctrine is to have application. All New Mexico and California at the time it was broached; all the territories now held, wherever situated, and as much as can be added to them—these additions have already been considerable, and vast and varied accessions are still expected. Arizona has been acquired; $50,000,000 were offered to Mexico for her northern half, to include Monterey and Saltillo; a vast sum is now offered for Sonora and Sinaloa, down to Guaymas; Tehuantepec, Nicaragua, Panama, Darien, the Spanish port of Santo Domingo, Cuba, with islands on both sides of the tropical continent. Nor do we stop at the two Americas, their coasts, and islands, extensive as they are, but circumvolving the terraqueous globe we look wistfully at the Sandwich Islands, and on some gem in the Polynesian group, and plunging to the antipodes pounce down upon Formosa in the China Sea. Such were the schemes of the last Administration, and must continue if its policy should continue. Over all these provinces, isthmuses, islands, and ports, now free, our Constitution must spread (if we acquired them, and the decision of the Supreme Court [in the Dred Scott case] stands), overriding and

overruling all antislavery law in their respective limits, and planting African slavery in its place, beyond the power of Congress or the people there to prevent it."

The brief filed in the Armstrong case contains so many erroneous statements of the view and position which the Attorney-General has been supposed to have taken on behalf of the United States upon this question, that I feel it necessary to point out some of these misapprehensions.

I am unfortunate, indeed, if I have not succeeded in conveying to the judges of this court a better appreciation of the attitude of the Government than seems to have been acquired by counsel who have filed briefs in opposition in these cases. And let me say, generally, that in the discussion of this subject there has been an excess of what might perhaps be called sentimental statesmanship—too much predominance of the mere academic and theoretical and emotional ideas of government. There are more people, I suppose, who think that the question to be decided in these cases is as to the right of the people of Porto Rico and the Philippines to self-government, than there are who understand that the question is merely one as to the construction of a very small clause of the Constitution relating to uniformity of taxation. The whole question arising under the Porto Rico act is whether indirect taxes must be uniform throughout the United States in the sense of the whole dominion of the United States, or whether that clause is satisfied by restricting uniformity to the States. Now, self-government, and the right of self-government, for any section of the country except that within the confines of the States, is not provided for or granted as a limitation upon the power of Congress; nor is the doctrine of our ancestors, that taxation and representation are inseparable, a part of our system of government under the Constitution. There is no less authority for this assertion than the decision of this court in the case of *Loughborough* v. *Blake*, and the constant instance before all our eyes, of the government of the city of Washington, which probably comprises within its borders as large a proportion of intelligent, happy people as any other municipality on the face of the earth, and people possessing as good a government and as well administered. So self-government and the right of representation which were involved in the contest of our Revolutionary forefathers were not made a part of our fundamental law; and when anybody suggests that Congress has not the power, without exercising tyranny, of governing Porto Rico or the Philippines or putting down the rising of peoples ambitious to govern themselves, whenever they say that Congress has not the power to do that without being despotic, they are mistaken. Congress has the power to govern all territory outside of the States with representation; has a right to impose laws upon it without asking the consent of the inhabitants, even against their consent and against their protest, as it has frequently done.

Now, the brief in the Armstrong case is signed by the distinguished counsel who is to follow me in this case, and I therefore must express my surprise that the attitude of the Government on the real question at issue should have been so misapprehended. For instance, on page 30 it is said:

"The Attorney-General, in his brief, contends that 'the ordinary and necessary powers of an independent nation' demand an unlimited

hand in the government of territory outside of the States of the American Union; that but for this unlimited power this Government would not be able to exercise the functions of an independent nation."

Counsel further in their brief declare:

"Congress is omnipotent nowhere on the face of the earth."

As if anybody had said they were, or as if the Government contended that they were!

"Despotic power and omnipotence are not among the prerogatives of the President, or the Congress, or of both together."

Why of course not. We never contended they were.

"The Attorney-General reduces territorial possession to mere property, and declares that the inhabitants thereof have no rights which an independent government is bound to respect."

There could not be a greater perversion of the attitude of the Attorney-General and of the officers of the Government in this particular.

"In short, he contends that monarchical powers must be possessed by all independent governments."

Well, if by that they mean to accuse me of saying that every independent government must have some powers equally possessed by a monarchical government, I agree to it; but that it has any of the characteristics which mark a distinctively monarchical government, I deny.

"To sustain the position taken by the Government in denying to the new possessions a United States status"—whatever they mean by that—"the Government of the United States must be a despotism as to all territory outside of the States."

"Congress," they say, "is no more supreme in the territories than it is in the States, in fact." Well, I challenge that statement very vigorously.

The consequences of the contention of the Government are stated to be—

"That the Congress of the United States and the President, in their treatment of the people of these said places, are not operating under the Constitution."

We never claimed anything of the kind. In the Goetze case I referred to the undisputed contention there asserted by counsel for the appellant that the Government of the United States is one of delegated powers, and that its powers are not absolute and untrammeled, but subject to certain limits never and nowhere to be transcended. I stated then the position of the Government to be that the United States has been vested, not with all powers, but only with certain particular powers. These particular delegated powers are in some respects limited and confined in scope and operation, but in other respects they are entirely unlimited. I asserted there that the contention of the Government did not imply the possession by Congress of all unlimited despotic powers in the government of territory.

I declared that in this respect nothing further was meant or intended by the counsel of the Government than was meant by this court when it declared in so many words that the power of Congress over the Territories was general and plenary, or when it declared, through Mr. Justice Bradley, in the Mormon Church case, that in legislating for the Territories "Congress would doubtless be subject to these fundamental limitations in favor of personal rights which are formulated in

the Constitution and amendments; but those limitations would exist rather by inference and the general spirit of the Constitution than by any express and direct application of its provisions."

I shall not repeat further what I said before, but I beg to call attention to all that I said on this subject in the former brief. We plant ourselves squarely on the statement of this court in the Mormon Church case, which I have just read, that in legislating for Territories Congress would be subject to those fundamental limitations in favor of personal liberty which are formulated in the Constitution and the amendments, but which exist rather by inference and the general spirit of the Constitution than by any express and direct application of its provisions. Do our opponents dispute the soundness of that position? Do they quarrel with the declaration of Mr. Justice Bradley in the Mormon Church case? If so, then they can quarrel with me. If they do not, then we are agreed. That is the attitude of the Government. No argument has been heard in this case on behalf of the Government, not a word, not a syllable, that was directed toward any measure that could infringe on the personal rights of any inhabitant of any territory over which the American nation holds sovereignty.

Now, a good deal of discussion has been had with reference to this word "territory." I propose to ask the patience of the court while we take another incursion into a consideration of the nature and history of territory, its acquisition, its government by the United States.

The word "territory" in its general sense means a section of the earth. It may mean all the sections of the earth over which a nation holds sovereignty, as we might very well say, having in mind the right of the United States as opposed to all other countries—"I stand on American territory; I am within the territory of the United States; I am within the United States." But the term territory in the sense of the Constitution, in the clause authorizing Congress to dispose of and to govern it, applies of itself, and by itself, to the tracts of land belonging to the United States. It must be property; it must be a possession; it must be something which can be ceded, something that can be deeded. "Ceded" is the word used in connection with the grants by which the United States acquired the Northwest Territory, and the other territory which has come to us by cession. It was "territory." Now "territory" in the constitutional sense does not necessarily signify land with inhabitants. "Territory" belonging to the United States includes, necessarily, territory which is not, and territory which is, inhabited. Did all of the Northwest Territory, or the territory south of the Ohio River, have inhabitants when the United States acquired it? Did not they acquire what our historians and our statesmen were accustomed to call the Wilderness and the Solitary places? It is easy to conceive of a government becoming possessed by cession, or conquest, or discovery, or occupation, of vast tracts of land without a single human soul upon them. Is it any the less territory? Now start the process of inhabitation. One man lands on it—some Robinson Crusoe. He is the sole inhabitant. He is the governor and the governed. If the right of self-government existed in the inhabitants of territory he would be the criminal, the court, and the jury, if you had to extend the processes of the common law to the island which he occupied. But instead of one, there go a colony—not a colony perhaps, for then it would come under the special provisions relating to an offshoot of the parent place—but there come

inhabitants from the four quarters of the globe, and from one, there are ten, and a hundred, four hundred, as there were white inhabitants of Alaska in 1884, when the act concerning it was passed. And now how many are there in Alaska? Where does the point, the line, come, between the condition of the territory when it is sparsely inhabited and when it is populated so numerously that the inhabitants are entitled, not to personal rights, mind you, but to some political rights or consideration? Now, obviously, if the court please, within the meaning of the Constitution you can draw no such line. It is all territory. The Hawaiian Islands, with their organized form of government, a president, a local legislature, courts, methods of taxation, were annexed as a part of the territory of the United States. But outside of the stipulations of the resolution by which they were admitted, if it had been a case of absolute conquest, they had no more rights than ten people would have who might inhabit some one of the unknown and unnamed islands in the Philippine Archipelago—no more *constitutional* rights, I mean; rights, according to the principles of liberty that underlie all our institutions, that are embedded in the social compact, yes—but we are talking in this case, if your honors please, not about personal rights. You are not called upon to decide what the personal rights of the inhabitants of Porto Rico are. I will concede that there are citizens of the United States there. It is immaterial to ask how they got there. It is unnecessary for our friends on the other side to argue that the treaty of cession made the native inhabitants citizens, in order to get citizens in the island. Citizens of the United States have gone thither from this country, and are citizens of the United States there now. But it is not their rights, as citizens, their personal rights, that are involved. It is a mere economic question, a mere fiscal question, a mere question of the right and power of the Government to select the objects of taxation and the methods of taxation. There is nothing tyrannical about that. Many taxes might be constitutionally laid that would be in effect despotic, tyrannical, oppressive, destructive. I think my friend on the other side has often argued that way as to a good many taxing laws of the United States, which were nevertheless declared and held to be constitutional.

But these sections of land that become territory must of necessity be always and at all times subject to the government and control of Congress without any distinction between their character, or grade, or condition. That is the point I am trying to make—that there can not be any difference between the vacant wastes of Alaska, where some alien Norwegians, for instance, may be prospecting for gold to-day—there can not be any constitutional difference between the power of Congress to govern, to tax, to alienate that, and their power to govern, to tax, to alienate Porto Rico. And I will say, if your honors please, barring the stipulations of the treaty and the vested rights that may have been created by the action of Congress, there is no difference in constitutional power as to Oklahoma, or Arizona, or New Mexico, or any other land that comes under the designation of "territory belonging to the United States."

But, your honors ask, is it possible that the United States can alienate New Mexico, and deprive the citizens there of rights and immunities that they possess as citizens of the United States? If so, what protection have they? I can only say that if this country were so unfortunate as to be overcome in a war, it might be necessary to do

that very thing. And by the very treaty of cession, they would probably endeavor, as Spain, and France, and Mexico endeavored in their treaties of peace, to protect the rights of those who had been their citizens. I do not claim that the inhabitants would not retain their right of citizenship if they desired to remove into the limits of our own country; but that the United States has the right to withdraw its sovereignty and control from any piece of territory necessarily follows from the language of this paragraph, which says that they may dispose of it. But the rights of these people may be possibly a matter of compact. Chief Justice Marshall said that when a territory was ceded after conquest, the inhabitants became the subjects of the new power, who had full control over them, "subject only to the stipulations contained in the treaty." Now, it is easily said that every act of Congress is repealable by another act; and that every treaty is repealable by an act of Congress. I deny it, if the court please; I deny that an act of Congress or an act of the treaty-making power, which confers vested rights on any individual or class of individuals, can be repealed by a subsequent law. Congress has power to admit a State. True. After it is admitted, can Congress repeal the act and turn the State out of the Union? The treaty-making power accepts a cession of territory upon certain conditions, conferring certain rights. Do they mean to tell me that when those rights become vested an act of Congress can divest them? The United States accepted the cession of the western lands of North Carolina on certain stipulations contained in the deed of cession. Is it possible that Congress, after having accepted that deed, and solemnly bound the great corporation known as the United States to those conditions, can turn around and repeal the conditions and retain the cession? There is a principle of fundamental justice that would stand in the way.

Now, the character of territory ranges all the way from the wilderness of Ohio, and Indiana, and Illinois, and Michigan, as it was in 1787—to the barren wastes that were called the Great American Desert or the frozen regions of the Arctic; it embraces conditions ranging all the way from barrenness to thick population. Congress must have the power somewhere to exercise political discretion in dealing with the government or territory which has as varying conditions as these—must have it, otherwise it can not govern. So that how Congress will deal with territories becomes a matter of political discretion, under the Constitution. What kind of a government it will make is a political question. It is not a political question, and it does not pertain to the government of a territory, to say that Congress can not create a title of nobility. But when it comes to devising what the form of a government shall be, whether it shall be by one supreme governor, like Claiborne of Louisiana, or by a governor and a court of judges, who shall have legislative power, as was provided for the Northwest Territory, or whether it shall be no government at all, but merely the extension of some of the laws of the United States, with a few officers appointed by the President to enforce them, as we have in Alaska; whether it shall be this, or that, or the other, must be within the discretion of the body to which have been given the responsibility and the power. Who would assume a responsibility like this? What body of statesmen about to form the first American Congress, under the Constitution, would ever have walked into the hall of Congress and taken the oath to support the Constitution of the United States,

if it was understood that their discretion was as narrow, that their hands were as much tied in dealing with these divergent conditions as in dealing with equal, uniform, similar States of the Union? If your honors please, there is a vital question here. Is this to be a lame, impotent, impossible Government? Because if we can not govern territory in accordance with its conditions and circumstances; if we can not govern it according to the nature of the people that inhabit it, their habits and language and local laws, according to the products that they raise and the things that they consume, which are not matters, mind you, of personal right, but of an economical nature; if we can not exercise that discretion, then everybody would want to absolve himself from the responsibility of governing it at all, and the nation would be in a position where it did not dare to take any accession of territory except such as is capable of being governed in accordance with the uniform rules that must prevail among the uniform, equal, and similar States of the Union.

Now, why, may I ask, should internal-revenue taxes be required to be uniform? Why should tariff laws be required to be uniform throughout all the extent of the territory which the United States possesses? I do not mean as a matter of purely Congressional policy, but why should it be so constitutionally? There is no consideration of personal right in it. On the other hand, every reason of prudence would have taught our fathers, as we can see now, that it would be most inconvenient to have a uniformity rule. Take direct taxes, if your honor please; they are to be imposed upon the States in accordance with the population, and to be apportioned in accordance with the population. This court has distinctly said that they do not need to be imposed on the District of Columbia or the Territories. There was not any reason why the Constitution should require them to be imposed on the Territories and the District of Columbia. Congress may, if it see fit, impose them on the District of Columbia and the Territories. But it does not need to. The Constitution does not require it. Well, we all agree that the sole object of the uniformity required by indirect language as to direct taxes in the Constitution was to protect the equality of the States as between themselves, and make each one of them bear an equal and similar burden. There was not any reason why the Territories should be brought into this compact. They were not a party to the bargain. It was not necessary to put stipulations into the Constitution to get the Territories to accept it, because the Territories had to accept the Government of the United States. They were not asked anything about it. They did not vote whether they would or not. It was compulsory with them. But there is a rule of uniformity required as to the States for obvious, well-known reasons. Now look at that clause of the Constitution giving power to levy duties, taxes, imposts, and excises. If uniformity of direct taxes had not been provided for by another part of the Constitution, it would have been in the last clause, and the clause would have read, "duties, *taxes*, imposts, and excises shall be uniform throughout the United States." But they had provided for uniformity of direct taxes somewhere else, so it was not necessary to provide for it there.

But they tell us Chief Justice Marshall said in the Loughborough case that indirect taxes had to be uniform throughout all the vast extent of the American empire. Well, he did use language to that effect, but that was not the decision. The question in that case was whether Con-

gress *could* lay a direct tax on the people of the District of Columbia, and the court decided that they could. Incidentally he remarked that duties, imposts, and excises may be and must be imposed throughout the United States—meaning thereby "the whole American empire," including the territories northwest of the Ohio. Now, that, I say, was not decision. And, if the court please, if it were not for that expression of Chief Justice Marshall I sincerely doubt whether this contention would have ever risen. Why should the distinction have been made? It is asking a good deal of a Chief Justice that he shall stand or that his successors shall stand to the correctness of every fugitive expression which was intended as a part of a process of discussion and not as a point decided. The eminent Chief Justice took that point as conceded in the case. The point argued in the case was whether the District of Columbia *could* be taxed, seeing that it had no representative in Congress. *That* was the question argued and *that* is what was decided. But what reason was there in the nature of things why a direct tax should not be required to be uniform over all the territory and that internal taxes, indirect taxes, should be so required? Is there any rational difference? Is there any reason to be found in the history of the adoption of the two provisions? Hear what Mr. Justice Story says in his work on constitutional law with reference to the reasons for the adoption of these various provisions.

Answering the question why "duties, imposts, and excises" are required to be uniform throughout the United States, he says:

> "The answer to the latter may be given in a few words. It was to cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist. The agriculture, commerce, or manufactures of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less-favored neighbors. The Constitution, throughout all its provisions, is an instrument of checks and restraints, as well as of powers. It does not rely on confidence in the General Government to preserve the interests of all the States. It is founded in a wholesome and strenuous jealousy, which, foreseeing the possibility of mischief, guards with solicitude against any exercise of power which may endanger the States, as far as it is practicable. If this provision as to uniformity of duties had been omitted, although the power might never have been abused to the injury of the feebler States of the Union (a presumption which history does not justify us in deeming quite safe or certain), yet it would, of itself, have been sufficient to demolish, in a practical sense, the value of most of the other restrictive clauses in the Constitution. New York and Pennsylvania might, by an easy combination with the Southern States, have destroyed the whole navigation of New England. A combination of different character, between the New England and the Western States, might have borne down the agriculture of the South; and a combination of a yet different character might have struck at the vital interests of manufacturers." (2 Story on Constitution, sec. 957.)

He discusses the cognate clauses of the Constitution relating to taxation by the States, showing that all of those clauses are a part of one and the same system and have the same object, viz, the regulation of taxes within the States and by the States. "No State shall, *without the consent of Congress*, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress. No State shall, without the consent of Congress, lay any tonnage duty." In the first draft of the Constitution the clause stood: "No State, without the consent," etc., "shall lay imposts or duties on imports." The clause was then amended by adding "or exports," not, however, without opposition, six States voting in the affirmative and five in the negative; and again, by adding "nor with such consent, but for the use of the Treasury of the United States," by a vote of nine States against two. In the revised draft the clause was reported as thus amended. The clause was then altered to its present shape by a vote of ten States against one; and the clause which respects the duty on tonnage was then added by a vote of six States against four, one being divided. So that it seems that a struggle for State powers was constantly maintained with zeal and pertinacity throughout the whole discussion. If there is wisdom and sound policy in restraining the United States from exercising the power of taxation unequally in the States, there is, at least, equal wisdom and policy in restraining the States themselves from the exercise of the same power injuriously to the interests of each other. A petty warfare of regulation is thus prevented, which would rouse resentments and create dissensions, to the ruin of the harmony and amity of the States. The power to enforce their inspection laws is still retained, subject to the revision and control of Congress, so that sufficient provision is made for the convenient arrangement of their domestic and internal trade, whenever it is not injurious to the general interests. (Idem. sec. 1016.)

"No tax or duty shall be laid on articles exported from any State. (*a*) No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. (*b*) Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

The obvious object of these provisions is to prevent any possibility of applying the power to lay taxes or regulate commerce injuriously to the interests of any one State so as to favor or aid another. If Congress were allowed to lay a duty on exports from any one State, it might unreasonably injure or even destroy the staple productions or common articles of that State. The inequality of such a tax would be extreme. In some of the States the whole of their means result from agricultural exports. In others a great portion is derived from other sources—from external fisheries, from freights, and from the profits of commerce in its largest extent. The burden of such a tax would, of course, be very unequally distributed. The power is therefore wholly taken away to intermeddle with the subject of exports. On the other hand, preferences might be given to the ports of one State, by regulations either of commerce or revenue, which might confer on them local facilities or privileges in regard to commerce or revenue. And such preferences might be equally fatal if indirectly given under

the milder form of requiring an entry, clearance, or payment of duties in the ports of any State other than the ports of the State to or from which the vessel was bound. (Idem, secs. 1013, 1014.)

Now let us take these words "*uniform throughout the United States.*" That phrase occurs three times in the Constitution. Duties, imposts, and excises shall be uniform throughout the United States; a uniform rule of naturalization and a uniform law of bankruptcy throughout the United States. The day of choosing electors shall be the same "throughout the United States." Do not let us mislead ourselves and each other by attempting to fasten on anybody else a meaning which he does not intend. When we say "a part of the United States" let us understand in what sense we are speaking of the United States. There are undoubtedly different senses in which the term "United States" is used in the Constitution. I have pointed them out in my former brief, and I do not mean to go over the distinctions again; but here are three clauses exactly alike, occurring three times—"throughout the United States." Are you going to add to the confusion that already exists as to the meaning of the term "United States" by further confusing the meaning to be attached to it when it is used thus as a special designation of extent—"throughout the United States!" What is the rational process of interpretation of that clause? Take the three instances. Can you find one of them that will determine exactly what is meant? Yes; you can. The day of choosing electors must be the same "throughout the United States." That fixes the clause. It means throughout the States of the Union. It does not mean throughout the Territories at all. Now, therefore, you have got a guide; you have got a positive sense in which that phrase was used by the Constitution makers. Now, tell me any reason why the same interpretation should not be put on it in every other place where it occurs? Why, it is immediately answered—uniform law as to naturalization throughout the United States; yes, throughout the States forming the Union. Why? Because they had a special citizenship of their own, and they had the right to admit foreigners to that State citizenship, and except for that provision they would have been passing laws on the subject of naturalization which would not be uniform among the States. And if you will refer to the case of *Sturges* v. *Crowninshield*, in 4 Wheaton, you will see that the provision for uniform bankruptcy laws was intended to operate upon the States. The Constitution does not need to give Congress the power to pass a uniform law on naturalization in the Territories. It had that right under its power to govern, and its ordinary national powers. It does not need a grant of the power to pass a bankruptcy law in the Territories. It has it. So we come to duties, imposts and excises, which are to be uniform "throughout the United States." Now, then, we have every reason, historically, prudentially, and every reason arising from ordinary construction, requiring the same meaning to be put on that clause in that instance that is put on it in the other two. Why not? Will the learned counsel please tell the court, and tell us, why it is any more a matter within constitutional right to exempt the Territories from direct than from indirect taxes? I should think if there were to be any difference, it ought to be in favor of indirect taxes.

Now, how has Congress construed these words in this connection? Take all the acts levying a direct tax prior to 1815—and there are several of them—and you will find this language used: "A direct tax

of two millions of dollars"—the amount varying—"is hereby imposed *upon the United States.*" That is the language. There is no doubt about it. "On the United States, to be apportioned as follows," and then follows an apportionment of the whole amount among the different States of the Union. And it was not until the act which was approved by the court in the Loughborough case, the act of 1815, which directly imposed a specific sum on the District of Columbia as a direct tax, that Congress ever extended the act beyond the States themselves. But they always used this language to impose a direct tax—so many millions of dollars—"upon the United States." And when they passed an act providing for an enumeration of the inhabitants and the slaves within the United States, they made provision only for an enumeration within the States, and for no enumeration within the Territories. And you can follow all the laws of Congress on the subject from beginning to end and you will find that there is not one of them which attempts to tax the Territories, or is not inconsistent with a tax on a Territory, unless the word Territory, or some equivalent, is used therein. That is so as to the internal-revenue laws. The history of them from the beginning clear down to the present time goes to show this.

Now, where does Congress get the power to tax the Territories or property in the Territories? We contend, if your honors please, that it gets it—that it can be derived—from the power to make all needful rules and regulations respecting the territory belonging to the United States, and that seems to be conceded by counsel on the other side as correct. Now, I do not deny that we might also attribute, if it were necessary, some power to lay a Federal tax to the tax clause of the Constitution—the power to lay taxes, etc.—the direct-tax clause. Just as in the Canter case Mr. Chief Justice Marshall said, and as in other cases in the Supreme Court other judges have said, that no matter where the power to govern territory comes from, whether it is the natural result from our power to acquire and hold, or whether it comes from the clause of the Constitution, we undoubtedly possess it. It is full and plenary, and the power of Congress is supreme. What we say is that a power to tax territory would be a just and necessary incident of the power to govern conferred by the Territorial clause of the Constitution.

No compact was made between the States and the United States and the Territories on the subject of taxation. The States made the bargain, and they left an unrestricted discretion in Congress, both as to the subjects of taxation and the places where it should be levied and where it should not be levied. So that, if the court please, we are not, in our assertion of the power of Congress to govern territory, or to tax it, relying upon any inherent or implied power, in the sense in which those adjectives are sometimes used. It is a power necessarily implied in the power to govern. It is a granted power. We find it in the Constitution, not outside of it. We exercise it as a constitutional power, and not as an unconstitutional power.

Now that Congress has the power of taxation is conceded. Is that power absolute or unlimited? It is absolute in some respects; it is limited in other respects. What are the limitations in the Constitution on the power of taxation? They are three, as far as I know: First, that taxes must be apportioned in the States of the Union, and need not be apportioned in the Territories; second, indirect taxes,

which includes duties, imposts, and excises, must be uniform "throughout the United States," whatever that means. Now, there may be a third, although that has been doubted; that is, that the purposes for which taxes, etc., are laid shall be limited to the payment of the debts, the common defense, and the general welfare. Beyond those three, I know of no limitation on the power of taxation contained in the Constitution. Certainly there are none in the Bill of Rights; there are none in the specific limitations put upon Congress. So that we may say that with those exceptions the power of taxation is unrestricted; is absolute, unlimited, arbitrary. Counsel on the other side would probably, but improperly, say that that is an assertion of despotic power. We will not quarrel about terms. We say that, subject to these restrictions that I have mentioned, the power of Congress to tax is absolute, is unlimited, and is arbitrary—arbitrary, because it can fix at its will, at its arbitrament, the subjects of taxation, the amount, the rate, even "within the United States."

Now, whether this duty may be laid on goods coming from the islands into the United States or going from the United States into the islands is a question that must be answered in the affirmative unless some restriction against it can be cited. Counsel refer to the clause of the Constitution which forbids any preference to the ports of one State over the ports of another. That forces them to the contention that the ports of Porto Rico are the ports of a State.

The principle of uniformity, to whatever extent it goes under the Constitution, is a pure matter of geographical equality, not a matter of personal or inherent right; and there is not any question of tyrannical or despotic power over the rights and liberties of any person or any people.

Now, Federal taxation under our Constitution is either general or local. General taxes are levied under that clause of the Constitution which says that duties, imposts, and excises must be uniform. Local taxes are not. They are levied under the provision which authorizes Congress to govern territories. Local taxes are for the support of territorial or non-State governments. There may be a country which needs no government, because it has no inhabitants, or so few that no officers of the law are necessary to receive salaries or to incur expenses. There would, therefore, be no expenditures necessary for that place. But local taxes are for the support of whatever territorial or non-State government exists, either in the District of Columbia or in the islands. Now, this Porto Rican tariff is of the local kind. I say that, because it is avowedly by the act devoted to the government of the island. Contrary to the rule that prevails in every other Territory of the United States, all the revenues derived from imports are allowed to be taken by the inhabitants to pay their local expenses. There never was such generosity shown before by any government to any section of its people!

Now, general taxes, as distinguished from local, are of two kinds, direct, and what you may call for brevity, indirect, meaning thereby duties, imposts, and excises. Whatever limitations were placed in the Constitution upon the power of taxation were intended to apply to general Federal taxation. The taxes, general taxes, authorized by the Constitution to be laid by Congress, within the States, are all Federal taxes. Congress can not levy a local tax in a State. The Federal taxes are imposed within the jurisdiction of the States, which, in some

senses, constitute already organized, independent, and sovereign entities of government, possessing and required to execute for their own internal needs many powers of government, including the sovereign power of taxation for their own purposes. And the power of the States to raise money for their own purposes does not depend at all on the will of Congress.

Before the Constitution they had all the power of taxation. They granted part of it away—enough to authorize Congress to tax them to maintain the Federal Government and provide for the common defense; whereas, under the Confederation they had retained the power to tax themselves for these national purposes, and had given the confederacy no power except the power to levy a requisition upon them. So there was every reason why the States in giving up a power should guard themselves, parting with part of their power, giving the United States Government the power of exclusive taxation of some kinds, and of concurrent taxation of other kinds, for Federal purposes. So that this right of the United States is a concession operating within the limits of the States, a concession made to the General Government.

Now these concessions were guarded by limitations, and in the nature of things the limitations, I say, were only such as the States required and demanded for their own protection. No such conditions exist as to territories. The government of territories, whether they are denominated local or general, is all Federal. You can call it municipal, you can call it territorial, you can call it by whatever name you please, but it is all Federal. The source of it is the Federal power vested in Congress. The legislatures of the territories exercise only a delegated power of legislation, and they are the mere legislative agents of Congress, and everything they do and enact is but by the power that Congress has given them, and even that is not irrevocable.

In the case of *Gibbons* v. *The District of Columbia* it was declared that the power of Congress, legislating as a local legislature for the District, to levy taxes for District purposes only, in like manner as the legislature of a State may tax the people of a State for State purposes, was expressly admitted in *Loughborough* v. *Blake*, and has never since been doubted. "In the exercise of this power," says Mr. Justice Gray, "like any State legislature unrestricted by any constitutional provisions, Congress may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property." (116 U. S., 404.) That is a declaration of this court as to what the power of local, non-State government is under Congress. Congress may do it, or the local government may do it. It is all the Federal power of taxation. Whatever a State legislature might do, if that legislature were unrestricted by a State constitution, select particular articles of property, tax horses and not tax cows, tax houses and not tax the land on which they stand, tax one locality and not another; no provision for uniformity, no provision for equality; one kind of property taxed at one rate, another at another rate, that is the kind of power the Constitution has given Congress when it comes to taxing these people for their own benefit, a power that would enable Congress to prefer every American-born citizen in Porto Rico and to put the whole burden on the native inhabitants, if they saw fit to do it.

Mr. Justice HARLAN. Do you mean to say that if Congress should say to New Mexico, You have the power to pass all legislation consistent with the Constitution of the United States, that the Territorial legisla-

ture could impose local taxes upon a part of the people and exempt all the others?

The ATTORNEY-GENERAL. Well, it would puzzle me, sir, to find any constitutional inhibition against that. That is what I understand this language I read to mean—in the case of *Gibbons* v. *The District of Columbia*.

Mr. Justice HARLAN. I do not understand that language to throw out of view the general limitations.

The ATTORNEY-GENERAL. If your honor please, every time we open a door here we see long passages running off into obscurity, and I do not want, if your honor please, to be bound to give a correct answer to every hypothesis that may be suggested as a possible consequence of some particular part of the argument. And therefore I will say that whatever the State of Connecticut, without any provision as to equal and uniform taxation, may do, whatever the State of New Jersey could do before it had a provision for equal and uniform taxation, whatever any other State of the Union could do as to its citizens in the way of selecting the objects of taxation—making a difference of rates, special exemptions, special privileges, all that sort of thing—Congress by this decision may do in the Territories. Now, I would not undertake to give a catalogue of all the practical outrages that might be committed under the Constitution. There are a great many that may be committed by a popular legislature under a constitution, but the essential justice of a thing is not always determined by its constitutionality.

Chief Justice FULLER. Well, does not that mean unrestricted by the Constitution—if unrestricted by the Constitution?

The ATTORNEY-GENERAL. All that a State legislature may do, if unrestricted by the State constitution.

Chief Justice FULLER. If Congress were unrestricted in that particular, I mean in that particular case, does not the opinion just mentioned a few moments ago mean that Congress had the power if unrestricted by the Constitution?

The ATTORNEY-GENERAL. That is what I say it means, sir. Whatever a State unrestricted by its State constitution might do?

Chief Justice FULLER. Do you think that means that Congress is unrestricted by the Constitution?

The ATTORNEY-GENERAL. In imposing local taxes?

Chief Justice FULLER. Yes, in the particulars named.

The ATTORNEY-GENERAL. I do not think, if the court please, that an act of Congress imposing a local tax for local purposes, which was an avowed confiscation of the property of one person, would be a constitutional imposition of a tax; and, on the other hand, I am perfectly free to say that there may be acts of practical confiscation by taxation which are constitutional. I do not want to say how far a tax which distinguishes between the property of one man and the property of another might violate certain inherent principles of the Constitution, or be subject to that clause which provides that property shall not be taken without due process of law and so forth.

Mr. Justice BREWER. In *McCulloch* v. *Maryland*, that clause which gives Congress power to pass all laws which are necessary and proper to carrying into execution the foregoing powers, Chief Justice Marshall, giving a broad construction to that, said: "Let the end be legitimate, let it be within the scope of the Constitution, and all means

which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution." Now, do you think the word "needful," in that clause "to make all needful rules and regulations," is to be understood as having the same limitation?

The ATTORNEY-GENERAL. I think so. I can not make a better definition than Chief Justice Marshall.

Mr. Justice BREWER. "Consistent with the letter and spirit of the Constitution." Now, assuming that the clause referring to duties and customs applied solely to the State, "the letter and spirit of the Constitution" defining the way those duties and customs shall be distributed, so as that they shall be uniform throughout the State, does it consist "with the letter and spirit of the Constitution" for duties and customs in these outlying provinces to be different and not the same?

The ATTORNEY-GENERAL. I think it does, most certainly. Just exactly the same as it may comport with the spirit and letter of the Constitution to require that the judges that sit on this bench shall be secure against interference as to their salaries or tenure of office by Congress or the President; and yet, in the Territories, judges may be removed at the will of Congress, their salaries may be changed, and they may be shuffled about at the will of the Government.

Mr. Justice WHITE. Suppose under the Constitution a treaty of cession were to be made of a territory on the Eastern seaboard, containing a seaport, and there were a majority, eliminating the great expansion of the country (and I have put this question in this way for the purpose of illustrating a question which comes to my mind), and supposing there were a majority in the Congress of the United States interested in commerce in the Atlantic seaboard, and they were to make that port a free port, and admit goods free from there into the United States, thereby giving all that section of the United States an absolute advantage over all other States; would not that violate the spirit of the Constitution, by giving Congress the power to legislate as to a Territory so as to destroy the very protection as to States which it is the purpose throughout the United States to secure?

The ATTORNEY-GENERAL. I understand the port referred to would not be within any one of the States?

Mr. Justice WHITE. Not within any one of the States.

The ATTORNEY-GENERAL. It seems to me, if your honor please, that that would be an abuse of power, not an excess of power. There are many abuses of power, and that would be a good illustration of one, but this court does not sit here to correct abuses of power, but rather usurpations of power. I can not see, if the court please, how you are going to distinguish by the geographical circumstances of territory, under the Constitution, for the Constitution does not distinguish geographically. It does not provide one rule for territory lying on the Rio Grande, and another rule for territory lying west of the Ohio, and another rule for territory lying in Alaska, and another rule for territory lying in the West Indies, and another rule for territory lying in the Philippine Archipelago. It provides one and the same rule for all.

Mr. Justice HARLAN. Suppose Congress—I desire to put another case: If Congress passed a law authorizing the legislature of Porto Rico to pass all laws consistent with the Constitution of the United States, could the Porto Rican legislature, under your view of the Con-

stitution, prohibit commerce or commercial intercourse between Porto Rico and a State?

The ATTORNEY-GENERAL. No, sir; because there is a treaty in this case. I answer the question, but I wish it to be understood that I am answering very quickly and without reflection. But the United States is bound by a stipulation in the treaty to secure to the inhabitants the retention of their right of property and so forth, which would by that be interfered with.

Mr. Justice HARLAN. Put the treaty out of the way and regard the Constitution alone.

The ATTORNEY-GENERAL. Put the treaty out of the way, and considering the power of Congress, have they a right to prohibit all commercial intercourse between Porto Rico and a State? Is that the question?

Mr. Justice HARLAN. Yes.

The ATTORNEY-GENERAL. Congress has; and it has done it. Congress set aside a vast section of this continent which they bought from Louisiana, and said no white man shall put his foot there as a matter of right. He may go as a privilege.

Mr. Justice HARLAN. Is that with reference to the Indian Territory?

The ATTORNEY-GENERAL. It is with reference to the territory set apart for the Indians. And they took territory which had not been Indian territory, and they said this shall be Indian territory; and then they took territory which had been Indian territory, and they said this shall no more be Indian territory.

Mr. Justice HARLAN. But suppose that had been territory occupied by white people?

The ATTORNEY-GENERAL. Why certainly, sir; just as they have in Alaska taken the islands of St. George and St. Paul and said this is a Government reservation. Nobody shall go there except by license.

Mr. Justice HARLAN. Is it a Government reservation?

The ATTORNEY-GENERAL. Yes, sir. That only means that the Government has reserved it for its own uses.

Mr. Justice HARLAN. You mean the Pribilof Islands?

The ATTORNEY-GENERAL. Yes, sir. That was bought the same as the other, from Russia. And suppose the United States had drawn a circle around the Klondike region, or had drawn a circle around the Cape Nome region and said, "This is a Government reservation. We propose to have the minerals that are in there." Could anybody dispute that power?

Mr. Justice HARLAN. What I asked was whether the Porto Rican legislature, under the circumstances I mentioned, could prohibit all commercial intercourse between Porto Rico and a State?

The ATTORNEY-GENERAL. The legislature could not exercise any powers except what Congress has given it, and if it exercised a power prohibited——

Mr. Justice HARLAN. I am supposing that Congress gave them the power to pass all laws consistent with the Constitution of the United States. Could the Porto Rican legislature under such an authority prohibit trade between Porto Rico and the United States?

The ATTORNEY-GENERAL. If the court please, I do not want to enter into a distinction between what the Porto Rican legislature might do and what Congress might do. I will say what Congress might do, but I prefer not to say what difference the delegation of legislation to a local

legislature might make, because then I run against the decision of this court in the case of *Stoutenburgh* v. *District of Columbia*.

I was speaking about the difference between local and Federal taxation, and was discussing the powers of Congress, similar in extent to the unrestricted power of a State legislature, to levy taxes for local purposes. Now, if this right of imposing local taxes exists, as unrestricted as I have claimed, for the support of a Territorial government, it might be useful to follow the subject and see where it will lead us, and how useless it would be to make a distinction between local and Federal taxes as a corollary to the doctrine which denies the right to lay special taxes for general purposes on territorial property by means of port duties, when carried back and forth between the ports of the United States and the islands.

The administration and the revenues of the Territories are subject to the absolute control of Congress. That is an undeniable proposition. Congress may repeal the whole form of government existing in a Territory, may destroy the legislature, vacate all the offices, take over all the public funds and absorb them into the common Treasury. And that proposition is just as true of the most highly organized Territory as of the most unorganized one. Congress may appropriate out of the Federal Treasury, out of the moneys raised to carry on the expenses of the Federal Government, all the money necessary to carry on a Territorial government, omitting all local taxation. We must not forget that "territory belonging to the United States" is the common property of the United States and is to be administered at the common expense, and for the common benefit of the States united, who jointly as a governing entity own it. Porto Rico and the Philippine Islands were not won by arms and taken over by treaty through the efforts or the influence or at the expense of the inhabitants, but through the might of the United States, upon *their* demand and upon *their* contribution of $20,000,000 to Spain, and upon the assumption by them, by the treaty, of solemn national obligations, which the United States, not the islands or their inhabitants, are bound to observe and keep. The inhabitants of the islands are not joint partners with the States in the transaction. They have no voice, no power, no influence in carrying out the stipulations of the treaty of Paris. It must be carried out by the Congress elected by the States and at the expense of the States represented in Congress, to wit, the General Government. The islands are territory belonging to the United States, and how can that which belongs to another be the other?

The islands were the things acquired by the treaty. The United States was the corporation or the party who acquired them and to whom they belong. The owner and the thing owned are not the same. Now, it is not a very sensible construction of the Constitution which will forbid Congress to do directly what it will permit it to do indirectly. And yet, if the contention on the other side is correct, it follows that Congress can not levy import duties on goods taken from the United States into Porto Rico, or vice versa, provided those duties are levied for general purposes, although Congress may levy any kind of a tax it chooses on the merchandise after it has been admitted into Porto Rico, provided it be for local purposes; and it may by legislative act take over such taxes into the General Treasury, to be paid out at the pleasure of Congress for general purposes.

Taking into consideration the relation of the Federal Government

stitution, prohibit commerce or commercial intercourse between Porto Rico and a State?

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Taking into consideration the relation of the Federal Government

to territory, the fact that it is the common property of all the States, that the General Government, through Congress, must support and administer the government of the territory, if it is to have any government, that Congress alone has the power, and discretion as well, to say whether there shall be any organized government in any particular territory, and what such a government, if allowed, shall be, it is necessary to concede the broadest discretion to Congress in determining the means by which, and the sources from which, the revenue to carry on the government of such territory shall be raised.

In so far as the question of taxation for local territorial purposes is concerned, therefore, it is clear that the express tax clauses of the Constitution are not applicable, and neither the law of apportionment nor of uniformity exists.

The right to tax merchandise for local purposes existing in Congress, it is immaterial what the merchandise consists of, or where it originated, or who is its owner. So, also, it is not perceived that to withhold the levy of the tax until the merchandise is brought into a port of the United States modifies or destroys the power to tax for such local purposes. The tax may be imposed in Porto Rico or held in abeyance until the merchandise reaches a port in the United States, when, as a preliminary to its admission (not after its admission), it may be taxed for the support of the government of the island.

One Territory may be taxed for the support of its local government, while another may be supported wholly from the general Treasury of the United States. In this there would be a technical inequality, a violation of technical uniformity, but the practical wisdom and the justice of it might be universally conceded. The question would be one of governmental discretion vested in Congress, which neither the States nor the courts of justice are authorized to review.

We have been talking heretofore about port duties. I now desire to call your honor's attention to the fact that it is not port duties alone that are involved in this case; all *internal-revenue* taxes must by the Constitution be as uniform as port duties. They are required to be uniform throughout the United States, and all the public discussions, and most of the arguments here, have proceeded on the assumption that the principle of uniformity must be enforced by this court upon Congress in dealing with these territorial acquisitions in order to protect the rights, liberties, and property of the inhabitants of the islands. And the contention was specifically made on the other side that the only purpose of the Government in urging the opposite course is, that it does not want to have free trade between the United States and Porto Rico and the Philippines. Nothing could be more utterly erroneous. Nothing could more inadequately describe the importance of the consequences that would follow the necessity of making one absolute rule, not only of customs, but of internal revenue, throughout all the territories of the United States. And if it be true, as contended in these cases by the appellants, that the tariff laws of the United States, as soon as the islands of Porto Rico and the Philippines were acquired, took effect there, then it is also true that the internal-revenue laws took effect there at the same moment, and that being true, a tax imposed in violation of the uniformity clause of the Constitution is null and void. Then, if counsel are correct, the Government is unable to-day to collect in a constitutional method a single dollar of internal revenue under any existing law. If these islands became a part of the

United States, if Porto Rico had to be taxed as New York, and New Jersey, and California, then the Porto Rico act has nullified the internal-revenue laws, because it declares that the internal-revenue laws should not apply in Porto Rico, and therefore the laws are not uniform throughout the United States.

Now, if your honors please, there might be some argument made on the ground of policy in favor of having the same tariff rates between the United States and Porto Rico that prevail between ports of the States; but what argument can you make as a matter of policy for having the same internal-revenue laws on the basis of inherent justice? You can not make any such argument unless you know all the circumstances. The imposition of a tax in so far as relates to the selection of the objects of taxation and the kind of a tax to be imposed is essentially a subject for Congressional or legislative discretion. Can this court say that Congress was mistaken when it said the interests of Porto Rico required that it should not be subject to our internal-revenue laws? Can this court say that when the chairman of the Territorial Committee of the Senate reported that to impose the internal-revenue law on the products of that island would be ruinous he was mistaken? Are not you bound to presume that Congress was right as to the policy of the measure? You are therefore asked to set aside as null and void an act of legislation that was intended to preserve the Porto Ricans from ruin. Why, it has not been the interests of the people of the States, the material interest of the people of the States, that Congress and the President have been looking to. They have been looking to the interests of the people of Porto Rico to an extent of generosity never before equaled by any nation on the face of the earth. Every dollar of tariff duty collected at the ports of the United States on goods brought in since the date of the ratification of the treaty, aye, and before, has been turned over to the treasury of Porto Rico for local purposes. Every dollar of imports paid in that island is turned over for local purposes. They are exempted from the war taxes, they are exempted from the whisky taxes, they are exempted from the tobacco taxes, they are exempted from every tax which the industries of the United States are paying for the maintenance of the General Government. And more, Congress actually imposes a tariff duty of 5 cents a pound on coffee brought into Porto Rico, although that article is allowed to be brought into the United States without any tariff duty whatever, and this in the interests of the coffee producers of that island. While the benefit, the generosity, the magnanimity, the special interests, are all on the side of the inhabitants of the island, yet we are lectured here as having been deaf and dumb and blind to the ordinary rights of human beings; for having forgotten the principles of liberty that inspired our forefathers; for having imposed unjust and onerous taxes; for having been guilty of usurpation—and by whom? By Carlos Armstrong, a British subject, who declares himself a resident of Porto Rico, though preserving his status as a British subject; and it is in his name that this brief, which I have referred to and criticised, is filed, accusing the Attorney-General, accusing the President, accusing Congress, of upholding despotism and arbitrary government. It is Esau and not Jacob!

It is said—I mention this to illustrate—it is said that if the Dingley law took effect in the Philippine Islands, as they say it did, of its own force, the inhabitants of Mindanao, who live on imported rice, will starve,

because the import duty is manyfold more than the ordinary cost of the grain to them. Possibly we have more regard for the health, and the comfort, and the material welfare of these people than we have for their constitutional rights. I do not know. That will depend upon what your honors say. But in determining what constitutional rights are as applied to these people, we have not been blind to their material interests. I can not believe that this wonderful generosity, this unparalleled liberality, which these gentlemen say is usurpation, is misplaced, is impossible, is unconstitutional and void.

Here the Attorney-General suspended, the hour of 4.30 o'clock having arrived, and the court adjourned for the day.

FRIDAY, *January 11, 1901—12 o'clock m.*

ARGUMENT OF THE ATTORNEY-GENERAL—continued.

The ATTORNEY-GENERAL. If your honors please, I was arguing yesterday that whatever rule of uniformity prevails as to tariff, prevails also as to internal revenue, because they are both of them subject to the clause "throughout the United States," whatever that may mean. I was asserting that to impose uniformly throughout all the territory of the United States the internal-revenue laws of the United States would be almost impossible, but if possible at all, would be unwise, unequal in effect, difficult of collection, and probably in many places unprofitable. I was arguing that the determination of the question of whether an internal-revenue tax could wisely be laid in Sulu or in Alaska was a question that could with quite as much propriety be submitted to Congress as the question as to whether one or another kind of a public document should be stamped. A rule of uniformity for internal taxation applying only to the contiguous and compact States could be understood, and its effect properly measured in advance by the framers of the Constitution, because the States were contiguous, made up of similar populations, governed, even as to their domestic institutions, by similar laws, and conducted in a similar spirit. But when it comes to territory in every quarter of the globe, from the vast frozen wastes in the Arctic Circle to innumerable isles of the Pacific, varying in size from tracts of thousands of square miles to islets of a few thousand acres, divers races, polyglot tongues, manifold varying customs, traditions, traits, habits, products, a large and free-handed discretion is necessary, and a rule that would bind the Government to the measures of internal taxation which are appropriate and just among the States would be, as to all these Territories, if the same rule had to be applied to them, more to be denominated a straight jacket than a Constitution permitting judgment and discretion to the Government created by it.

And so it seems to me that we can properly say, looking at the circumstances, looking at the reasons, looking at the history of our country, its Constitution, its people, that as to the States uniformity is the just, the convenient, the obvious rule of taxation; because their rights, their status, their privileges as States are uniform, equal, and similar. But that diversity is the necessary rule as to Territory, because conditions and circumstances, and all the varying particulars

that make up the physical geography and the racial characteristics of the people, are diverse when you come to deal with territory as extensive and varied as that which the United States now possesses. Uniformity, constitutional uniformity as to the States, based upon reason, prudence, and convenience; diversity as to the Territories, based upon the diversity of circumstance, the necessity that the Congress shall have the power to impose only on the Territory such taxes as their circumstances can justly bear! Why, what would it involve to require that the internal-revenue laws should be executed uniformly throughout the whole extent of our domain as they are executed within the States and upon the Territories of the North American Continent? We are accustomed to have our opinions formed merely by the particular circumstances that are obvious to our senses. We have been so long used to regard the United States as an extent of country reaching from the Atlantic to the Pacific Ocean, and bounded on the north by the British possessions and on the south by the Mexican Republic, that it requires almost a wrench to take us out of our old habits of thought and accustom us to the fact that our domain on the north reaches to within the Arctic Circle; that we have the Sandwich Islands; that we have the vast Philippine Archipelago—the gateway to the trade of the Orient; that we have a little island in the Caroline group—Guam; that down in the Samoan group we have lately acquired another island with a peculiar people—some for commercial, some for strategic, some for the other general purposes of the nation. And we should not permit old forms of thought, old habits of expression, old suggestions of reasoning that applied only to the circumstances that have existed up to a recent day, to prevent our taking a broad view, a view which the administrative and legislative departments of the Government have been obliged to take, one that should carry their vision northward and southward and eastward and westward, beyond the continent to the east and to the west, among the islands of the sea, with due regard for the needs and interests of each and all. All these things rest within the possibilities of the future, behind that cloud of uncertainty which our forefathers could not penetrate with their vision; but they were none the less possibilities. And so when we come to consider the practicability of enforcing a uniform internal-revenue law over all these extended tracts of territory, varying from uninhabited wastes and small islands, isolated from all other nations, some of them, and isolated by thousands of miles from all other territory of ours, we ought to bear in mind the absolute impossibility, the absolute unwisdom, of attempting to put an ironclad rule of uniformity everywhere our jurisdiction extends.

It has been suggested that the President of the United States, immediately on the ratification of the treaty, ought to have put the tariff laws of the United States in force in Porto Rico. If he ought to have done that, he ought to have put the internal-revenue laws in force also. They are of the same kind. They are covered by the same clause of the Constitution. But he had no revenue officers; he had no means of determining except upon careful investigation and study of the conditions, whether they could be imposed or not. Every person in Porto Rico, if the contention of these people is true, every person in Porto Rico who gave a note or drew a check, or distilled rum, without paying the stamp tax or the excise tax, committed an offense against the United States from the date of the ratification of the treaty. Possibly

there is no machinery provided for punishing them, but if the law requiring them to pay the tax became operative there, why not the penalty which is contained in the same law? Does not this reduce the proposition to an absurdity? Is not the argument from inconvenience so powerful and persuasive that the court can not disregard it?

And yet, when Congress came to pass an act for the temporary government of Porto Rico, looking at their circumstances, considering the hardship, they declared that they would not impose on them the internal-revenue system of the United States. That was done to lighten their burdens, not to oppress them. Has anybody heard anywhere any protest against that exemption? Can you find in the records of the debates in Congress, in either House, any Senator or Member who protested that this exemption of the Porto Ricans from the internal-revenue tax was a violation of the Constitution, or an act of oppression or injustice to anybody? Not a word. Accepted as just, unanimously accepted as just, *nem. con.* And, similarly, when the resolution for the annexation of Hawaii as a part of the territory of the United States was passed, it provided that the respective systems of tariff law prevailing prior to the passage of the resolution should continue until changed by Congress. I would be much obliged to any gentleman on the other side who would point out to me a single word of objection made by anybody, anywhere, to the constitutionality or the justice of that provision, at that time. There is objection now, by people who desire to recover back money paid under that arrangement, but at the time it seemed to strike the good judgment and the judicial sense of every member of Congress, for nobody objected to it or criticised it.

One other thing. This diversity in the methods of taxation of the interests and properties and inhabitants of territories, which I contend Congress ought to be held to possess, is no more unjust, essentially, than the diversity which the States exercise throughout the extent of the Union.

There are varying systems of taxation in each State jurisdiction. True, for local purposes; for a State can not levy a tax for anything but a local purpose. But the reason for it is no stronger than the reason for permitting Congress to vary its tax provisions according to the circumstances of the territory upon which it is to be imposed.

Now, I ask the attention of your honors briefly to a review of the course of legislation by Congress on the subject of internal-revenue taxes so far as applied to the States or to the Territories. The first internal-revenue law was on distilled spirits and was levied by the act of March 3, 1791. For the purposes of collection, the United States was divided into fourteen districts, each district comprising one State and no more. So that actually, although it was a tax "within the United States," it was confined to the several States. No provision was made for the collection of the tax in the Territories.

The act of June 5, 1794, expressly extends the tax upon distilled spirits and stills to the Territories northwest and south of the Ohio River, by authorizing the President to erect new districts in that section and to appoint the necessary officers. By the act of July 12, 1813, the collection of direct taxes and internal duties was jointly regulated, but no provision was made for the collection of either species outside the eighteen States existing at that time; and the act required that separate accounts of the direct taxes and internal duties should be kept, and the account was to indicate the sums received from each *State*.

No provision was made for any account of any sums received from any Territory. Now, the act of August 2, 1813, reenacted the various internal-revenue duties which had previously been abolished, and charged the collectors appointed under those former acts with the collection of the duties imposed, and by section 2 expressly authorized the President to divide the several *Territories* of the United States and the District of Columbia into convenient districts for the purpose of collecting the internal-revenue duties, thus for the first time extending these laws generally and comprehensively to the Territories outside of the limits of the States. The internal-revenue law of 1862, the first passed after the commencement of the civil war, all the way through speaks of the *States and Territories of the United States* and the District of Columbia. It specifically mentions Territories everywhere that it mentions States throughout the whole body of that act, and it uses such phrases as this: "Within the United States or Territories thereof;" "Of the United States or Territories," and these are used to describe and locate the persons and property to be taxed. The act of July 13, 1866, was a general law, and largely reduced the duties. The act of July 20, 1868, made new provisions for the taxation of distilled spirits and tobacco. Section 104 of that act also construed the word "State" to include a Territory and the District of Columbia, and section 107 provided that the internal-revenue laws imposing taxes upon distilled spirits, fermented liquors, tobacco, snuff, and cigars shall be construed to extend to such articles produced "within the exterior boundaries of the United States," whether in a collection district or not. That is the clause which was construed in the Cherokee tobacco case, in 11th Wallace, which extended the revenue laws over the Indian Territory as to liquors and tobacco, notwithstanding the provision in the treaty with the Indians that their products should not be taxed. The dissenting opinion held that the Indian Territory was an exempt jurisdiction under the treaty, and that this section, No. 107, was not intended to repeal the treaty. The dissenting opinion did not say that *the Indians* were exempt, but said that *the Territory*, the whole of it, was an exempt jurisdiction.

I have already referred to the fact that the direct taxes levied by the early Congresses were declared to be imposed "upon the United States," and yet they were all distributed and apportioned by the act only upon the several States.

In 1868, in the Alaska act, the customs, commerce, and navigation laws were extended over Alaska, but not the internal-revenue laws. Now, clearly there is an argument to be derived from this as to the attitude of Congress on the subject—two arguments, indeed. First, that they thought it was necessary that they should extend the particular laws to this Territory in order to have them applicable, just as was done in the days of Thomas Jefferson as to Louisiana, and always since; but that they did not think that the customs laws needed to be uniform, or the internal-revenue laws needed to be uniform, because they extended one and did not extend the other. The act of 1868 did not extend the internal-revenue laws as to tobacco and spirits; but there were innumerable other internal-revenue excises at that time, and they were not extended. Neither were they extended to the Indian Territory. And, as a matter of practice, according to my advices from the Treasury Department, internal-revenue duties have been collected in Alaska upon liquors and tobacco only since December, 1872,

when the Territory was added to the internal-revenue district of Oregon by Executive order.

Now, has Congress ever made any distinction between the Territories and the States as to customs laws? I have not been able to examine fully all the laws on this subject, but accidentally, taking up the first volume of statutes only yesterday, I lighted on this:

The act of 1799 (1 Statutes, 627) provides for the extension of the customs laws to the Northwest Territory. There was a tariff law on the statute book. The act of 1799 extended that to the Northwest Territory. Now, that tariff law provided certain rates of duty on peltries, but section 105 of the act I have now spoken of, extending it to the Territory, contains this clause:

"No duty shall be levied or collected on the importation of peltries brought into the Territories of the United States." Not "territory," but "territories," thus making a plain distinction between a duty on products brought from a foreign country into one of the States, as, for instance, from Montreal into the State of New York, and those brought into the Territory northwest of Ohio.

Mr. Justice BROWN. Suppose they were afterwards brought into the States from the Territories——

The ATTORNEY-GENERAL. There was no provision whatever for their being taxed, and free access was had at that time and allowed between the people of the Northwest Territory and the States to come and go freely with their goods. It was only at the frontier that there was any interference. It is a plain exemption—"No duty shall be levied or collected on the importation of peltries brought into the Territory." Now, a duty was levied on all other dutiable merchandise and products when brought into the Territory, but then it was considered as brought within the United States.

Another instance. The Alaska act of July 27, 1868, lays a revenue tax or duty—that is the language—of $2 on each fur-seal skin taken or shipped from the islands of St. George and St. Paul, in Alaska. It lays no internal-revenue duty or tax on any other seal skins from any other part of the dominions of the United States; thus showing that in two instances at least Congress has made a difference, one being an instance of customs, and the other an instance of internal revenue.

It was admitted on the argument that one exception as to the alleged requirement of uniformity of taxation, etc., prevails as to the uncivilized Indian tribes on this continent. Just what warrant there is for treating uncivilized tribes of red men differently from uncivilized tribes of brown men, or black men, does not appear, and there seems to be no real difference that can be suggested. It is true that our Constitution authorizes the President and Senate to make treaties, to regulate commerce between the various States, with foreign nations, and with the Indian tribes; but such regulation of commerce with Indian tribes probably was intended to cover the Indian tribes—originally and primarily the Indian tribes—who were within the confines of the States. And so here is a consideration, a circumstance, in the present condition of this country, which requires that we should endeavor to stand at a point where we can view the situation as it is to-day, rather than as it was a century ago—take a different view of it, from what perhaps Chief Justice Marshall took when he spoke about our "Great American Empire," thinking then of the States and the Northwest Territory, peopled by the sons of the citizens of the States, endowed with a spe-

cific compact, through the ordinance of 1787, that they should at no distant day be admitted to the rights of statehood. We must look at the situation as comprehending a possibility—I do not say a probability, but a possibility—that the question might be as to the powers of this Government in the acquisition of Egypt and the Soudan, or a section of Central Africa, or a spot in the Antarctic Circle, or a section of the Chinese Empire. And in considering who shall acquire the rights of citizens just because they inhabit territory belonging to the United States, it is necessary to consider the nature and character of the different classes of people which, under the ample powers of the Government, may be added to our domain.

The clause of the Constitution which we have been discussing, the clause which confers upon Congress the power to govern territory, declares that it may make *all needful* rules and regulations respecting the territory of the United States. How should that be construed? The question was suggested yesterday from the bench. Let me read a passage from the same opinion, that of the Chief Justice in *McCulloch* v. *Maryland*.

> "The subject—that is, the subject under consideration—is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it to the power of Congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and to give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

Every word of that applies to this subject, as connected with the new conditions that confront the governing power of this country. The contention of the opponents of the Government in these cases, if sustained, will not safeguard a single personal right. It will only hamper the Government in the choice of its means, in the exercise of its discretion, as to the wisest method for itself and its people of governing the territory that belongs to it. It will secure nothing to the States, nothing to the inhabitants of the islands, except the necessity of sharing the burdens of Federal taxation, even if such a course shall plainly be to their prejudice and ruin. I submit that neither principle, nor precedent, nor policy require that this court shall make a decision which, contrary to the course of the Government for almost a century, shall reverse the action of Administration after Administration, and for all future time hamper the purposes, the powers, the progress, and the prosperity of the Great American Republic.